The Doctrine of Notice in Property Law

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Declaration

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March 2020, Stellenbosch

Summary

Since its reception in the 1880s, the doctrine of notice has caused many controversies in South African private law. The doctrine provides that if an acquirer of ownership was aware or foresaw the possibility of the existence of a prior personal right aimed at acquisition of ownership over the land when he or she accepted transfer (by registration), the holder of a prior personal right is entitled to have the sale and the subsequent transfer set aside, and have registration of ownership effected in his or her name. In case of an unregistered limited real right, the grantee is entitled to compel the subsequent owner to cooperate in the registration of the limited real right in the land in the deed office in his or her favour. This outcome appears to conflict with several basic principles of South African private law. Consequently, the doctrine of notice has caused several doctrinal problems in both the South African system of property law and in the basics of the South African law of contract.

Early South African case law and academic literature show that discourse regarding the doctrine of notice was centered on its doctrinal bases and scope of application. As a result, various doctrinal bases were developed in case law and academic literature in an attempt to justify and explain why under the doctrine a prior weaker personal right trumps a subsequent stronger real right. The main doctrinal bases advanced are equity, delictual liability, fraud, wrongfulness and fiction or recognition that the doctrine is an anomaly. However, recent case law and academic discourse has shown that there is a distinct lack of judicial and academic consensus regarding the doctrine's dogmatic basis. The absence of clear doctrinal basis caused considerable ambiguity

regarding the true scope of application of the doctrine of notice. Pertinently, the question is whether the doctrine should only protect prior personal rights to acquire real rights (*iura in personam ad rem adquirendam*) or should be extended to protect other rights, including rights that are purely personal in nature. Accordingly, this dissertation examines the doctrinal basis, scope and application of the common law doctrine of notice in South African property law.

Drawing from the insights gained from scrutinising the two most recent comparative contributions, I conclude that explanations in terms of the derivative acquisition model and fraud in its modern appearance as *mala fides* are the two most persuasive bases for the doctrine because they demonstrate that the doctrine is rooted in South African property law. Furthermore, the dissertation concludes that the doctrine should not be extended to the scenarios of sales in execution, options, rights of pre-emption, sales subject to approval by a third person, and other rights purely personal in nature, since these right operates outside of the two-stage derivative acquisition model. Therefore, the application of the doctrine should be restricted to the classic scenarios of double and successive sales, and personal rights which will become real on registration (*iura in personam ad rem adquirendam*) acquired by the prior purchaser or grantee of certain limited real rights because holders of these rights are operating within the domain of the two-stage derivative acquisition model.

Opsomming

Sedert die opname van die kennisleer in die 1880's, het dit talle strydpunte veroorsaak in die Suid-Afrikaanse privaatreg. Die leerstuk bepaal dat indien 'n verkryger van eiendomsreg bewus was van, of die moontlikheid voorsien het van die bestaan van 'n voorafgaande vorderingsreg, gemik op die verkryging van eiendomsreg ten opsigte van die grond toe hy of sy oordrag aanvaar het (deur registrasie), die houer van 'n voorafgaande vorderingsreg geregtig is om die verkoop van, en die daaropvolgende oordrag ter syde te laat stel, en registrasie van eiendomsreg te laat bewerkstellig in sy of haar naam. In die geval van 'n ongeregistreerde beperkte saaklike reg, is die begiftigde geregtig om die daaropvolgende eienaar te dwing om mee te werk aan die registrasie in die aktekantoor in sy of haar guns van die beperkte saaklike reg ten opsigte van die grond. Hierdie uitkoms skyn in stryd te wees met verskeie basiese beginsels van die Suid-Afrikaanse privaatreg. Gevolglik het die kennisleer verskeie leerstellige probleme in sowel die Suid-Afrikaanse sakereg as die basiese beginsels van die Suid-Afrikaanse kontraktereg veroorsaak.

Vroeë Suid-Afrikaanse regspraak en akademiese literatuur toon dat die diskoers aangaande die kennisleer gefokus het op die leerstellige grondslae en omvang van die toepassing van die leerstuk. As gevolg daarvan is verskeie leerstellige grondslae ontwikkel in regspraak en akademiese literatuur in 'n poging om te regverdig en te verduidelik waarom 'n voorafgaande swakker vorderingsreg 'n daaropvolgende sterkter saaklike reg troef. Die hoof leerstellige grondslae wat aangevoer word, is billikheid, deliktuele aanspreeklikheid, bedrog, onregmatigheid en fiksie of erkenning dat die

leerstuk ’n anomalie is. Nietemin het onlangse regspraak en akademiese diskoers aangetoon dat daar ’n duidelike gebrek aan regterlike en akademiese konsensus is aangaande die dogmatiese basis van die kennisleer. Die afwesigheid van ’n duidelike leerstellige grondslag het aansienlike dubbelsinnigheid aangaande die ware omvang van die toepassing van die kennisleer veroorsaak. Pertinent is die vraag of die kennisleer slegs voorafgaande vorderingsregte om saaklike regte te verkry (*iura in personam ad rem adquirendam*), moet beskerm, óf of dit uitgebrei moet word om ander regte, insluitend regte wat suiwer persoonlik van aard is, te beskerm. Dienooreenkomstig ondersoek hierdie proefskrif die leerstellige grondslag, omvang en toepassing van die gemeenregtelike leerstuk van die kennisleer in die Suid-Afrikaanse sakereg.

Die proefskrif put uit die insigte verkry uit die bestudering van die twee mees onlangse regsvergelykende bydraes en kom tot die gevolgtrekking dat ’n verduideliking in terme van die afgeleide eiendomsverkrygingsmodel en bedrog in sy moderne aansig as *mala fides* die twee mees oortuigende grondslae van die kennisleer is, aangesien hulle aantoon dat die leerstuk gewortel is in die Suid-Afrikaanse sakereg. Verder kom die proefskrif tot die gevolgtrekking dat die kennisleer nie uitgebrei behoort te word na die scenario’s van eksekusieverkopings, opsies, voorverkoopsregte, verkope onderworpe aan die goedkeuring van ’n derde persoon en ander regte wat suiwer persoonlik van aard is nie, aangesien hierdie regte funksioneer buite die tweestadium afgeleide eiendomsverkrygingsmodel. Daarom behoort die leerstuk beperk te word tot die klassieke scenario’s van dubbel- en opeenvolgende verkope, en vorderingsregte wat saaklik sal word met registrasie (*iura in personam ad rem adquirendam*), verkry deur die voorafgaande koper of begiftigde van sekere beperkte saaklike regte omdat houers van

hierdie regte funksioneer binne die domein van die tweestadium afgeleide eiendomsverkrygingsmodel.

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Chapter 1

Introduction

1 1 General

Continuous attempts by South African scholars to theorise and classify the doctrine of notice spanning the last eight decades, suggest some sort of inclination towards formalism based on the idea that legal materials can be reduced to rational and organised systems of interrelated principles. However, as Lubbe[1] avers, it appears that certain South African judges and commentators' sceptical attitude to a high level of theory has stood in the way of attempts to develop an academic legal science comparable to that in European jurisdictions. South African courts' recent attempts to explain the foundation of the doctrine of notice, which appears to conflict with several basic principles of South African private law, and the continuous expansion of the parameters of the application of the doctrine, further show the increasing need for a theory to explain the basis of the doctrine of notice which is reflected in positive law.

Regrettably, some judicial attempts to provide a basis for the doctrine of notice have exacerbated the dogmatic issues rather than resolving them. This is clear from the recent Supreme Court of Appeal judgment in *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO*,[2] where the court stated that fraud and the English-law doctrine of

[1] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 264-265.

[2] 2011 (4) SA 1 (SCA).

equity, serve as a justification for the doctrine of notice.[3] At the same time, the court expressed the view that the doctrine of notice is an anomaly which does not fit neatly into the principles of either the law of property or the law of delict.[4]

The purpose of this research is to examine the basis, basic characteristics, and scope of application of the common-law doctrine of notice in South African property law.

The classic illustration of the doctrine of notice relates to the double- or successive-sale scenario. A seller (S) sells a parcel of land to the first purchaser (P1) and then resells the same land to a second purchaser who is aware of the first sale (P2), usually at a far higher price. Initially, the P1 was entitled to claim from S that the transfer (registration) in the name of P2 should be set aside and transfer (registration) be effected by S in the name of P1. Later, P1 was permitted to compel P2 to cooperate in the de-registration of his or her title and to allow transfer (registration) of the title in the name of P1.

The second, and almost equally renowned scenario of the doctrine of notice, is where the grantor of a potential limited real right (servitude or long-term lease) sells and transfers the land to a second grantee by registering the unencumbered ownership in the land in the name of the second grantee. The second grantee has notice of the unregistered limited real right concluded between the grantor and the first grantee at the contractual stage. In such a case, the doctrine of notice entitles the first grantee to compel the second grantee to cooperate in the de-registration of his or her right of ownership over the land in the deeds office. Furthermore, it compels the second grantee to allow reregistration of ownership in the land that is now encumbered by a limited real right

[3] See *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 (SCA) 9E-F, 10C-D, 16D.

[4] See *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 (SCA) 10C.

(servitude or long-term lease) in favour of the first grantee. Consequently, whatever the scenario, the effect of the doctrine of notice is constant – it compels the subsequent acquirer of the land to allow registration of a prior personal right aimed at the acquisition of a real right.

1 2 Research aims

The research aims are the following:

- Analysing and discussing the basis, scope, and application of the South African common-law doctrine of notice.
- Analysing and discussing the distinction between real and personal rights, and the function of this distinction in property law and especially the contextualisation of this distinction in the relation to the doctrine of notice.
- To scrutinise the two most recent comparative law articles[5] on the doctrine of notice to draw on new ideas, and to indicate how these ideas can be made part of the South African system of property law and especially how the ideas can fit into the two-stage system of contract and transfer in the South African system of the derivative acquisition of real rights.

[5] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 126; NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189.

1 3 Hypotheses

- The basic principle of South African private law is that real rights prevail over personal rights, even if personal rights are prior in time, when these rights come into competition with one another.
- In so far as the doctrine of notice permits prior personal rights to prevail over subsequently acquired real rights, it is an exception to the basic principle.
- From the literature, it appears that there is uncertainty regarding the doctrinal basis for the protection afforded the holder of a prior personal right.
- Generally, the doctrine of notice applies to so-called *iura in personam ad rem acquirendam* (personal rights to acquire a real right), but recent case law appears to have extended the application of the doctrine of notice to purely personal rights which the contracting parties never intended would create a real right.
- If the doctrine of notice is extended to purely personal rights, it appears that it would accord personal rights an enforceability status akin to that of real rights, and this might be inconsistent with the basic principles that distinguish real and personal rights.

1 4 Methodology

In order to examine the basis, scope, and application of the doctrine of notice, I describe and analyse literature on the doctrine of notice, including old authorities, textbooks, journal articles, and case law. The purpose of such a description and analysis is to gain an understanding of how the doctrine operates in practice, particularly in different areas of property law. This investigation further indicates (the) justification(s) for permitting a

personal right to prevail over a real right. It also indicates the protection (if any) available to the acquirer of a subsequent real right. Therefore, a doctrinal analysis of common law is undertaken. As indicated above, comparative research is limited to the two most recent comparative-law articles on the doctrine of notice.[6]

1 5 Motivation for study

Since the early 1880s, the doctrine of notice has been debated in South African case law and literature. During this time, academics[7] argued the issue in terms of Roman-Dutch sources and relevant issues of principle and rationality.[8] The difficulty experienced by academics and the courts in explaining and justifying the doctrine of notice, is also apparent in recent literature, particularly as regards its basis and classification within the general conceptual framework of the South African private law.[9] Therefore, attempts to

[6] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 126; NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189.

[7] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182; GA Mulligan "Double sales and frustrated options" (1948) 65 *SALJ* 564-577; GA Mulligan "Double sales: A rejoinder" (1953) 70 *SALJ* 299-307; GA Mulligan "Double, double toil and trouble" (1954) 71 *SALJ* 169-169; JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34; JE Scholtens "Difficiles nugae - once again double sales" (1954) 71 *SALJ* 71-86.

[8] See also D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98.

[9] In this regard see FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36; D Carey Miller "A centenary offering: The double sale dilemma – time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 258.

classify the doctrine of notice within the general conceptual framework of private law seek to place it in either the law of obligations or the law of property. On the one hand, there are authors who argue that there is no need for an independent doctrine of notice as the doctrine should be explained on the basis of principles of the law of delict.[10] On the other hand, are authors who argue that a negligent infringement of a personal right does not constitute an actionable wrong in South African law.[11] The uncertainty with regard to the classification of the doctrine is intensified by the considerable ambiguity that characterises its application. From the above, it is clear that the operation of the doctrine of notice remains topical and contemporary, especially in light of the many controversies surrounding several aspects of the doctrine.

1 6 Summary of controversies

Early South African case law applied the doctrine of notice to personal rights that give rise to the acquisition of real rights (*iura in personam ad rem acquirendam*). However, recent case law appears to have extended the application of the doctrine to all personal rights, including those that will not become real rights on registration. In this regard, the doctrine of notice raises fundamental questions: On what basis is the holder of a prior personal right protected against a subsequent acquirer of a real right who had the requisite knowledge? What kinds of personal right are protected by the doctrine of notice?

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[10] NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 170. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32.

[11] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 53.

To clarify these issues, the second chapter explains the fundamental distinction between limited real rights and personal rights with an indication that the Registrar of deeds is willing to register a right or condition which complies with the twofold test (the intention test, and the 'subtraction from the *dominium* test') for registrability.

A closely related problem concerns the scope of application of the doctrine of notice. In principle, the doctrine should be applied only in the case of personal rights which give rise to the acquisition of real rights (*iura in personam ad rem acquirendam*). Therefore, the scenarios in which the doctrine of notice may be applied are double and successive sale transactions, and the transfer of ownership of land by the grantor to a second grantee of land burdened by an unregistered servitude in favour of the first grantee, or land burdened by an unregistered long-term lease or mortgage. However, in practice the doctrine has been extended to knowledge of prior options; rights of pre-emption; the transfer of land subject to the approval of a third person; and those cases in which land subject to a mortgage is sold in execution in a forced sale. An important question arising is whether such extension is compatible with the two-step requirement of the South African system of transfer of property, and therefore, whether it is justifiable.

The notice required for the doctrine to apply also gives rise to problems in practice. In this regard, the Afrikaans name of the doctrine ("kennisleer") is more helpful as it points to knowledge or awareness of the prior personal right on the part of the second purchaser in a double-sale scenario, or the second grantee in the case of unregistered servitudes and long-term leases. The crucial question is whether actual knowledge is required to frame the second purchaser or second grantee with *mala fides*, which triggers the operation of the doctrine, or whether *dolus eventualis* on the part of the second purchaser

or second grantee is sufficient to trigger its operation. Another question to be explored is at what time the notice must exist: must the second purchaser or second grantee be aware of the prior personal right at the moment when the contract or grant with the second purchaser or second grantee is concluded, or can the knowledge have been acquired at any time prior to the transfer or registration in the name of the second purchaser or the second grantee?

1 7 Doctrinal problems

The reception of the doctrine of notice in South Africa law caused the following *doctrinal problems* in the South African system of property law and in the basic principles of the South African law of contract.

(1) The doctrine of notice undermines the fundamental distinction in South African property law between real and personal rights. In general, real rights are enforceable against the entire world (*in rem*) and are stronger than and superior to personal rights, which may only be enforced against a particular person or groups of persons (*in personam*). I explain why the doctrine of notice contradicts this hierarchy.

(2) The doctrine of notice appears to contradict the maxim *prior in tempore potior in jure est* (priority in time gives priority in law). The doctrine conflicts with the rules applicable to competing personal and real rights. The above maxim applies in the competition between both two conflicting real rights and two competing personal rights. In the event of competition between a real right and a personal right, it is accepted that the real right prevails over the personal right. However, in terms of the doctrine of notice

the prior personal right of the first purchaser against the seller trumps the real right acquired by the second purchaser.

(3) Parties with competing personal rights *ad rem acquirendam* in land must each try to register his or her right first, as a real right acquired on registration trumps a competing personal right. However, the effect of the doctrine of notice is that although the first purchaser lost the race to the deeds registry, he or she can still claim that the "winning title" is voidable and can be set aside.

(4) A fourth problem relates to the application of the publicity principle. The publicity principle allows the second purchaser to rely on the deeds registry and to trust that it reflects the true status of rights in land. However, as South Africa has a negative system of registration,[12] the second purchaser cannot rely on the publicity principle to justify his or her acquisition of full title. The position as reflected in the deeds registry is not at all what it seems to be in that it fails to reveal that the status of the seller is subject to the personal right of the first purchaser.

(5) A final dogmatic problem with the doctrine of notice is that it allows the prior contract between the seller and the first purchaser to have repercussions for the second purchaser who was not privy to the prior contract. The doctrine is, therefore, in conflict with the widely recognised contract-law principle of privity of contract as, although there is no privity of contract between the first and second purchaser, the first purchaser is permitted to sue the second purchaser for specific performance of his or her contract with the seller.

[12] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 231.

1 8 Problems encountered in identifying the dogmatic basis of the doctrine

The search for a doctrinal basis for the doctrine of notice focuses on why the second purchaser or second grantee is penalised. It is important to note that the answer to this question does not necessarily have consequences for the requirements for the application of the doctrine in practice. Lubbe has labelled the doctrine of notice a doctrine "in search of a theory."[13] The aim of this dissertation is to determine which of the various bases (theories) advanced as the dogmatic basis for the doctrine provide an acceptable answer to why the second purchaser or second grantee is penalised because of his or her knowledge of the prior personal right.

The following suggested bases are subjected to critical examination:

(1) Early judicial and academic publications suggest that the second purchaser should be compelled to transfer the property to the first purchaser, or that the second grantee must allow the first grantee to register his or her potential limited real right against the property transferred to him or her. The English principle of equity provided the basis for a view that on a balance of equities it was unfair for the second purchaser to retain the property, or for the second grantee to retain the property unencumbered.[14]

(2) Lubbe identifies the traditional judicial characterisation of the doctrine of notice as a species of fraud or chicanery (double-dealing) on the part of the second purchaser or the

[13] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 258.

[14] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 182; EM Burchell "Successive sales" in E Kahn (ed) *Selected South African legal problems: Essays in memory of RG McKerron* (1974) 91 *SALJ* 40-46 40.

second grantee. This doctrinal basis, as well as the dilution of this basis to mere bad faith (*mala fides*) on the part of the second purchaser, is critically assessed.[15]

(3) Van der Merwe and Olivier[16] hold the view that the doctrine of notice is rooted in Aquilian delictual liability, and that negligence on the part of the second purchaser or grantee is required for the operation of the doctrine.

(4) Van der Vyver[17] advocates that the first purchaser acquires a relative real right (or a personal right with real operation) against the second purchaser or second grantee in order to compel the second purchaser to transfer the property to the first purchaser, or to accept the property subject to the limited real right of the first grantee.

(5) Brand's[18] theory is that the doctrine of notice is based on the fact that the infringement of the personal right of the first purchaser or first grantee by the second grantee acquiring ownership of the property or of an unencumbered real right by the second purchaser or second grantee is perceived as a wrongful act.

[15] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 258.

[16] NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 261, 264 and 280.

[17] JD van der Vyver "The doctrine of private-law rights" in SA Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201-246 238-239. See also *Krauze v Van Wyk en Andere* 1986 (1) SA 158 (A).

[18] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30.

(6) Lubbe,[19] and subsequently Carey Miller,[20] are of the view that the doctrine of notice can be explained in terms of the fundamental principles used in the process of derivative acquisition. Lubbe submits that the sharp and rigid distinction between obligations *ex contractu* and property rights is tempered by the doctrine of notice. Carey Miller takes the matter further. He submits that bad faith results in the acquisition of a defective title by the second purchaser (C) as a result of an insufficient intention to acquire a perfect title. Importantly, he does not deny that the seller (A) had the required capacity to pass full ownership in the property, but that the intention of the second purchaser (C), though sufficient for transfer, lacked full (moral) integrity and, therefore, that the second purchaser was capable of receiving no more than a voidable title which could be set aside by the first purchaser (B).[21]

[19] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 248-249.

[20] The theory was developed in DL Carey Miller "Good faith in Scots property law" in ADM Forte (ed) *Good faith in contract and property* (1999) 103-129 127; D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114.

[21] DL Carey Miller "Good faith in Scots property law" in ADM Forte (ed) *Good faith in contract and property* (1999) 103-129 106-107; D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 114-115. See also NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 170-171 and 173.

1 9 Why does the holder of a prior personal right have a direct action for relief against the second purchaser or second grantee of a limited real right?

In *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigte Bäckereien (Pty) Ltd* Van Heerden AJA remarked that this feature of the doctrine of notice bestows a real function on a prior personal right.[22] Badenhorst, Pienaar and Mostert suggest that the holder of the previous personal right acquires a personal right with limited real effect.[23] In his most recent contribution, Badenhorst goes even further and suggests that on successful application of the doctrine of notice, the personal right of the first purchaser operates as a limited real right against the second purchaser or second grantee who is not a party to the obligation between the first purchaser and the seller. Accordingly, he argues that real operation is given to a personal right. He submits that the application of the doctrine of notice leads to a doctrinal anomaly, since an obligatory relationship (personal right) *is turned into a real right*.[24] Badenhorst quotes Zimmermann[25] in support of his submission. The question is whether this submission by Badenhorst and Zimmermann reflects the true legal position.

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[22] *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910G-H: "Die juiste siening na my mening is dat vanweë die kennisleer aan 'n persoonlike reg beperkte saaklik werking verleen word."

[23] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 86.

[24] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 122. Badenhorst quotes R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 237.

[25] R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 237.

1 10 Sequence of chapters

The main objectives of chapter 2 are, first, to provide an historical overview of the origins and development of the distinction between personal and real rights in Roman law and Roman-Dutch law and its further development in modern South African law. Second, the chapter aims to examine the function of this distinction in property law, and its implications for the doctrine of notice. This is particularly prevalent in derivative acquisition of ownership or real rights in land where the second acquirer of the land has notice of a prior contract of sale of the land or the grant of a limited real right in the land by the seller of the land. The third objective of the chapter is to investigate whether non-adherence to the *numerus clausus* principle leaves the door open for unregulated party autonomy to create new categories of limited real rights in land outside the traditionally recognised categories such as servitudes, mortgages, and long-term leases. This will form the basis for highlighting the traditional categories of real rights in land and the new types of limited real right in land that have developed in the context of South African property law. This is important because the tendency in South African case law is for the nature and content of a new type of limited real right to be influenced, to some extent, by the nature and content of the analogous real right which provides the basis for its recognition. My hypothesis is that an appraisal of the distinction between the consensual creation of limited real rights and the consensual creation of personal rights that have some bearing on land, will serve as a doctrinal basis for establishing the requirements, scope, and extent of application, and justifications for the doctrine of notice in chapters three and four of this dissertation.

Chapter 3 deals with the basic characteristics of the doctrine of notice and why it is regarded as an anomaly in both the law of property and the law of contract and is sometimes perceived also to involve the law of delict. This is followed by an explanation of the type of notice required for the doctrine to operate. I then discuss whether the doctrine should operate to transform all personal rights (including personal rights of a purely personal nature that were never intended to be real rights) into rights with real effect, or whether the doctrine should only operate to transform *iura in personal ad rem acquirendam* into rights with real effect. The final and most important part of the chapter deals with the scope of the doctrine of notice and addresses the various scenarios in which the doctrine should or should not operate.

Chapter 4 sets out the various judicial pronouncements on the basis of the doctrine of notice followed by a critical analysis of academic views concerning the dogmatic basis of the doctrine. Chapter 5 summarises my conclusions with regard to the controversial aspects of the doctrine outlined above, followed by conclusions as to the doctrinal problems arising from the doctrine and a critical assessment of the various dogmatic bases advanced for the doctrine. In the final part of the chapter 5, I attempt an answer to the difficult question of why the holder of the prior personal right has a direct action for relief against the second purchaser or the second grantee of a limited real right. In this chapter, I draw extensively on the insights gained by studying the two most recent comparative contributions on the doctrine of notice.[26]

[26] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 122; NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189.

Chapter 2

Personal rights and limited real rights

2 1 Introduction: Defining the problem

The basic principle of South African law is that a real right prevails over a personal right, even if that personal right was prior in time, when they come into competition with one another.[1] However, this firm divide between the law of contract and property law, embodied in the fundamental distinction between personal and real rights, is tempered by the doctrine of notice.[2] The doctrine of notice provides that, if the acquirer of a real right in land had knowledge of the existence of a prior personal right that would establish a competing real right upon registration, the acquirer must give effect to the prior personal right.[3] In so far as the doctrine of notice permits prior personal rights to prevail over

[1] *Hassam v Shaboodien* 1996 (2) SA 720 (C) 724H-I. See further FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ De Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21.

[2] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 248. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21.

[3] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 24B; *De Villiers v Potgieter NO* 2007 (2) SA 311 (SCA) 9. See further AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 228; H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 58; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 247.

subsequently acquired real rights, it is an exception to the basic principles which relates to derivative acquisition of property rights.

The operation of the doctrine of notice result in a forced transfer of property because the subsequent acquirer's property rights could be transferred to the holder of a prior personal right without the acquirer's consent. Furthermore, the doctrine cancels the sale and reverses it, with the result that the acquirer is prevented from acquiring property even though the formal process of transferring it to him or her had been completed. Therefore, it is important to describe and analyse the distinction between real and personal rights in this chapter so to gain insight on why under the doctrine of notice a holder of a weaker prior personal right is protected against the holder of a stronger real right. In other words, my hypothesis is that an appraisal of the distinction between the consensual creation of limited real rights and the consensual creation of personal rights that have some bearing on land, will serve as a doctrinal basis for establishing the proper requirement(s), scope, and extent of application, and justifications for the doctrine of notice in chapters three and four of this dissertation.

Given the large number of academic journal articles, case notes, and chapters in books published over the last eight decades, which have specifically sought to analyse the distinction between real and personal rights in land and in so doing have focused on the registrability of rights, it probably goes without saying that this distinction occupies a special place in South African private law. The concepts of real and personal rights are not mere abstractions, but represent the most important tools available to legal scholars

and practitioners.[4] The distinction between real and personal rights is one of the most fundamental notions of civilian legal systems because it plays a pivotal role in demarcating the border between the law of property and the law of obligations.[5] But it comes as no surprise that for centuries this distinction has remained the subject of legal discourse in a number of jurisdictions, including South Africa.[6] Most authors on this topic would agree that the distinction between real and personal rights (at least in civilian legal systems) is thoroughly unsatisfactory.[7] Consequently, some academic writers have

[4] S Ginnosar "Rights in rem - A new approach" (1979) 14 *Israel LR* 286-336 289 outlines the significance of the concepts of real and personal rights. Ginnosar succinctly contends: "For the jurist, these notions of real and personal rights are more than abstract concepts; they are the very tools of his trade. He must therefore constantly ascertain that they are well adapted to daily use; and, where so required, he must be ready to revise them."

[5] R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120 106. See also S Ginnosar "Rights in rem - A new approach" (1979) 14 *Israel LR* 286-336 287; CG van der Merwe *Sakereg* (2nd ed 1989) 58; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 50; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 59; W Freedman "The application of the *numerus clausus* principle in South African property law: An assessment of *Willow Waters Home Owners Association (Pty) Ltd v Koka NO*" (2015) 1; PJ Badernhorst "New real rights to land in South Africa: A twofold test" (2015) 4 *Prop LR* 197-206 197.

[6] For a comprehensive analysis of the distinction between real and personal rights in Belgian and French law see V Sagaert "Real rights and real obligations in Belgian and French law" in J Milo & S Bartels (eds) *The content of real rights* (2004) 47-70; V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141. For detailed analysis of the distinction between real and personal rights from Scots' law perspective, see KGC Reid "Obligations and property: Exploring the border" 1997 *Acta Juridica* 225-245. For Dutch law position, see THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82.

[7] In this regard see KGC Reid "Obligations and property: Exploring the border" 1997 *Acta Juridica* 225-245 225; MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 11-12; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 68;

explicitly pointed out that this distinction has taken on something of a mystical nature, and presents a problem without a solution.[8]

According to the majority of academic views, the main contributing factor to the conundrum regarding the distinction between real and personal rights is that South African property law – in comparison to civilian legal systems with civil codes, which supposedly entail closed lists of real rights in land that may be created by consensus – does not formally adhere to the *numerus clausus* principle.[9] The *numerus clausus*

W Freedman "The application of the *numerus clausus* principle in South African property law: An assessment of *Willow Waters Home Owners Association (Pty) Ltd v Koka NO*" (2015) 1; PJ Badernhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 234.

[8] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 179. See also AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 238.

[9] Section 3(1)(r) of the Deeds Registries Act 47 of 1937 confirms the non-adherence to the *numerus clausus* principle in South Africa since it authorises the registrar of deeds to register any real right, *not specifically* referred to in this subsection, and any cession, modification or extinction of any such registered right. The non-adherence to the *numerus clausus* principle was also confirmed by South African courts. For example, see *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 434D-E. See further PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 220; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 48; CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 802; MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 1; P van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 91. W Freedman "The application of the *numerus clausus* principle in South African property law: An assessment of *Willow Waters Home Owners Association (Pty) Ltd v Koka NO*" (2015) 1, explains this challenge as follows: "One of the more unusual features of South Africa's system of property law is that it does not have a *numerus clausus* or closed list of property rights, or, to put it more accurately, limited real rights. An important consequence of this feature is that new types of limited real rights can be developed. This can take place either in terms of an agreement between parties to create a real right or in terms of a bequest of a right in a will. While this feature promotes the principles of contractual and testamentary freedom, it also gives rise to certain practical problems. One of these is that the absence

principle entails that the types of property right are limited,[10] and therefore not susceptible to radical expansion or modification by individual or parties to meet their specific needs or wishes.[11] Therefore, strict adherence to the *numerus clausus* principle implicitly curtails party autonomy in the law of property for sake of legal certainty and predictability.[12] By way of contrast, non-adherence to the *numerus clausus* principle supposedly advances contractual and testamentary freedom.[13] The *numerus clausus* principle, therefore, functions as a gatekeeping strategy to restrict the consensual creation of new types of real right in land outside the well-established categories such as ownership, servitudes, real security rights, and long-term leases.[14]

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of a closed list of limited real rights makes it difficult to distinguish between limited real rights and personal rights, at least in certain circumstances."

[10] The term *numerus clausus* has two meanings. Interpreted in its traditional sense, it entails the content of full ownership rights in both tangible, whether movable or immovable, and intangible assets such as shares, debts and intellectual property rights. While its narrow meaning refers to the categories or types of limited real rights in the property of another, also known as *iura in re aliena*. Unless stated otherwise, the reference to *numerus clausus* in this dissertation is to the latter interpretation. See further THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 61; AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 408-409.

[11] In this regard see CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 802.

[12] W Freedman "The application of the *numerus clausus* principle in South African property law: An assessment of *Willow Waters Home Owners Association (Pty) Ltd v Koka NO*" (2015) 11.

[13] W Freedman "The application of the *numerus clausus* principle in South African property law: An assessment of *Willow Waters Home Owners Association (Pty) Ltd v Koka NO*" (2015) 1.

[14] THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 59. See also W Freedman "The application of the *numerus clausus* principle in South African property law: An assessment of *Willow Waters Home Owners Association (Pty) Ltd v Koka NO*" (2015) 11; AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 409, especially footnote 2.

The emergence of the *numerus clausus* principle was a revolutionary reaction against feudal land relationships which had an effect of fragmenting land ownership. The academic consensus is that a legal system which recognises multiple forms of land ownership (held simultaneously by different people), may result in fragmentation of ownership.[15] Van der Walt succinctly outlines the challenge posed by fragmented land ownership:

> "The problem with fragmented ownership is that it is inevitably relative to the extent that it cannot be enforced *erga omnes* ("against the whole world"). However, since the prospect of a return to fragmented feudal land relationships (*splitting up* of ownership) is remote today, at least in the civilian legal systems, fragmentation remains a threat only to the extent than an unchecked proliferation of limited real rights in land (*splitting off* of limited real rights from ownership) might reach a point where either the combined burden imposed by layers of multiple limited real rights or the recognition of one particular corrosive limited real right erodes the residuary ownership of the landowner to such an extent that it becomes meaningless."[16]

It is therefore important to avoid unnecessary confusion as to the distinction between real and personal rights in South African law. One way of doing so is to contextualise issues or challenges relating to the demarcation and correlation of real and personal rights from the outset, and therefore focus on aspects that are more problematic and/or grey areas where the distinction is not easily drawn. In practice, the distinction between ownership –

[15] See AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 408.

[16] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 408-409. A particular corrosive right in this sense, says Van der Walt, would be a permanent and transferable right of usufruct. Usufruct grants a beneficiary every possible use and exploitation entitlement. Therefore, permanent duration would wipe out the landowner's residuary right.

potentially the most complete and "absolute" real right[17] – and limited real rights in general, is neither problematic nor does it cause confusion because registrability of ownership is seemingly not an issue.[18] The acquisition, transfer, and termination of real rights over corporeal movables does not pose a serious problem because actual delivery of movables serve as legal transfer and/or publicises the existence of a limited real right over corporeal movables.[19] In addition, South African property law appears to recognise a *numerus clausus* of real rights in movable property.[20] The problem is therefore not about real and personal rights in the most general sense; Roman law distinguished them and they therefore do not pose a general problem.

[17] *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 106-107. See also MD Southwood *The compulsory acquisition of rights* (2000) 1.

[18] See PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 222.

[19] However, see section 1(b) of the Security by Means of Movable Property Act 57 of 1993. G Pienaar "The effect of the original acquisition of ownership of immovable property on existing limited real rights" (2015) 18 *PELJ* 1480-1505 1481 in footnote 5 states, "the only exception where a limited real right to movables can be exercised without control is a notarial bond, which is a statutory exception. Tacit hypothecs must normally be perfected before they have real effect." The lessor's tacit hypothec, which attaches to movable property of the lessee found in the leased premises when rent is due but not paid does not require registration to have a real effect. For a comprehensive analysis of the lessor's tacit hypothec see NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University 28-35; AJ van der Walt & NS Siphuma "Extending the lessor's tacit hypothec to third parties' property" (2015) 132 *SALJ* 518-546 521.

[20] C Lewis "Real rights in land: A new look at an old subject" (1987) 104 *SALJ* 599-615 603. Contra, MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 5. De Waal argues that there is no *numerus clausus* of real rights in movables, but he does acknowledge, "[T]here is, however, no example of a new type of real right developed by the courts in the sphere of movables." It is noteworthy that over the years, the legislature has recognised new types of real rights in movables.

The original acquisition of real rights does not appear to pose a serious hurdle as regards the distinction between real and personal rights in land. Fundamentally, there are two reasons for this. First, obtaining real rights in land by means of original acquisition does not require consensus (in a form of real agreement) or cooperation between the beneficiary of a limited real right and the owner of the immovable property, or cooperation between the predecessor in title and the new owner of the immovable property. In other words, in the case of original acquisition, the acquirer or beneficiary of a limited real right does not derive his or her title or limited real right from the predecessor in title or the owner of the object of the limited real right. These real rights vest in the new owner or beneficiary on the basis of original acquisition of rights.[21] According to some writers on the topic, it is an accepted principle that the acquirer or beneficiary of a limited real right (acquired in an original way) is not affected by defects in the title of the predecessor.[22] However, there is a contrary view. [23]

[21] G Pienaar "The effect of the original acquisition of ownership of immovable property on existing limited real rights" (2015) 18 *PELJ* 1480-1505 1480. See further DL Carey Miller *The acquisition and protection of ownership* (1986) 120-123; CG van der Merwe *Sakereg* (2nd ed 1989) 216-2015 and 289-299; GJ Pienaar "The real agreement as *causa* for the transfer of immovable property" (2015) 78 *THRHR* 47-62.

[22] CG van der Merwe *Sakereg* (2nd ed 1989) 216; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 389-390; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 137; JC Sonnekus "Sub hasta-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *TSAR* 696-727 727.

[23] G Pienaar "The effect of the original acquisition of ownership of immovable property on existing limited real rights" (2015) 18 *PELJ* 1480-1505 1480-1481 & 1499 convincingly argues that such an assumption is not a foregone conclusion (that ownership in immovable property is acquired unburdened in the case of the original acquisition). Pienaar argues that the problem with such an assumption is that the principles of original acquisition of movables are often applied to the original acquisition of immovable property, mainly because there was not a clear distinction between the acquisition of movables and immovables in Roman law. In case of movable property, it is an accepted principle that any limited real rights do not burden

Second, in principle registration, which plays a dual function (creation and/or transfer, and publicity of the real right) in the derivative acquisition of real rights,[24] is not a requirement for original acquisition of real rights in land.[25] However, registration[26] of

movable property acquired in an original way, as previous limited real rights are extinguished on the vesting of ownership. This conclusion is logical because it is normally required that limited real rights in respect of movables are exercised by means of physical control of the property, which control cannot be exercised by the holder of a limited real right in circumstances where the property is in the physical control of the acquirer. Pienaar concludes that the same principle is not applicable in the case of immovable property acquired by means of original acquisition, where the limited real rights are not automatically extinguished.

[24] Section 16 of the Deeds Registries Act 47 of 1937. CG van der Merwe *Sakereg* (2nd ed 1989) 13-14 observes that the function of the publicity principle is to create a presumption that the person in whose name the property or right is registered is the lawful right holder. PJ Badenhorst & PPJ Coetser "*Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) – The subtraction from the dominium test revisited" (1991) 24 *De Jure* 375-389 375-376 argues that the significance of registration of private rights is the publicity function. The registration affords *prima facie* proof of the real right, not only as far as the registered holder is concerned, but also with regard to a third party relying on the deeds registry. See further JG Horn *The legal effect of rights specific to sectional title property in South Africa, with reference to selected aspects of the Australian and Dutch law* (2017) unpublished LLD dissertation North West University 18.

[25] See in general G Pienaar "The effect of the original acquisition of ownership of immovable property on existing limited real rights" (2015) 18 *PELJ* 1480-1505 1480. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 172.

[26] Section 32 of the Deeds Registries Act 47 of 1937 authorises the Registrar of deeds to register servitudes vested by expropriation or by statute. However, the registration of such servitude is for purposes of publicity, since these servitudes are vested by operation of the law (without parties consent or co-operation) as soon as the statutory requirements are met. AJ van der Walt *The law of servitudes* (2016) 279-280 explains that other servitudes in land that are created by operation of law (for instance right of way of necessity and some statutory servitudes) are established as soon as the legislation is promulgated; upon the realisation of a specific occurrence (for example, when a licence is granted); and/or when the existence is confirmed by court order. Only some servitude that originate in legislation require registration before they vest. Van der Walt points out that it is therefore useful to distinguish between the origin or source of a servitude and the establishment of a servitude as a limited real right, because the two do not necessarily coincide. The main purpose of the distinction is to emphasise the point at which a servitude acquires the character of a limited real right that is enforceable against successive owners of the dominant land. For a similar view see, CG

ownership in land or limited real rights over land may take place after acquisition of real rights in an original way in the interests of legal certainty and publicity.[27] Therefore, registration of real rights acquired by way of original mode does not serve the function of creating real rights as in case of derivative acquisition of real rights.[28]

Strictly speaking, the principal issue, therefore, relates to the apparent similarity of rights created in a contract or in terms of the bequest of a right in a will that can be either a personal or a limited real right in land. That is to say, the distinction between real and personal rights in the main poses a hurdle when dealing with immovable property. More explicitly, in relation to conditions that arise from contract or in terms of a bequest of a right in a will that may have some bearing upon land, and may, therefore resemble or

van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2nd ed 2010) para 609.

[27] In case of ownership acquired by way original acquisition, registration is important because the new owner cannot convey real rights to any other person. Thus, in the absence of registration the new owner will not be allowed to pass transfer to a purchaser, to mortgage the land, to have a servitude registered over or even in favour of it. See in this regard, PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 172; MD Southwood *The compulsory acquisition of rights* (2000) 130.

[28] AJ van der Walt *The law of servitudes* (2016) 281 indicates that in the context of acquisition of servitude by way of original acquisition method, publicity does not have the function of creating the limited real right, since servitude that created *ex lege* are generally limited real rights and therefore enforceable against others (including successive owners of the burdened land) regardless of their knowledge of the existence of the servitude. Accordingly, Van der Walt argues that when it is said that it is advisable to have servitude created by operation of law registered for the sake of publicity the idea is to protect the servitude holder against repeated litigation by new owners of the burdened land who refuse to acknowledge the existence of the servitude. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 172; MD Southwood *The compulsory acquisition of rights* (2000) 130.

purport to create a limited real right in land.[29] Thus, the problem regarding the correlation and distinction between real and personal right is located within derivative acquisition of real rights in or over immovable property. Derivative acquisition of real rights is always the result of a bilateral transaction as it involves the cooperation of the predecessor in title or the owner of the immovable property, which is the object of the limited real right.[30] Consequently, the title of the subsequent acquirer is subject to any defects in the predecessor's title.[31] In other words, all limited real rights existing at the time of the transfer burden the immovable property as the acquirer's ownership derives from the ownership of the transferor and the transferor cannot transfer more rights than he or she has been entitled to exercise (*nemo plus iuris ad alium transferre potest, quam ipse haberet)*.[32] A general principle of South African law is that consensual acquisition and transfer of real rights in land can only be either by registration of a notarial deed of cession, or by registration of a deed of transfer with a reservation of a real right in favour

[29] See also AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 179; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 50.

[30] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 72-74. See also CG van der Merwe *Sakereg* (2nd 1989) 301-305; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 389-390; G Pienaar "The effect of the original acquisition of ownership of immovable property on existing limited real rights" (2015) 18 *PELJ* 1480-1505 1480.

[31] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 72.

[32] G Pienaar "The effect of the original acquisition of ownership of immovable property on existing limited real rights" (2015) 18 *PELJ* 1480-1505 1480. See further PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 72-74. See also CG van der Merwe *Sakereg* (2nd ed1989) 301-305. This principle comes from Roman law and Roman-Dutch law. The acceptance of this principle in South African law is evident in *Glathaar v Hussan* 1912 TPD 322 327; *Mngadi v Ntuli* 1981 (3) SA 478 (D); *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 (4) SA 936 (T) 942.

of either the transferor or a third party, or by granting a real right.[33] That is to say, derivatively acquired real rights in land must be registered, whereas personal rights in land – with a few exceptions – may not be registered.[34]

Pragmatically, there are two analytical perspectives from which the question whether a right in a grant or bequest in a will is either a limited real right or a personal right, can be better understood.[35] The first perspective entails whether or not the registrar of deeds – authorised by section 3(1)(r) of the Deeds Registries Act[36] – should register a deed of transfer with a condition or right that does not purport to create a real right in land. The second relates to a situation where registration of a deed of transfer with a disputed right or condition has already occurred. In the latter situation, the dispute generally arises where one party seeks to enforce the registered right against successors in title to the land, and asks the court to declare the right or condition a real right. The other party will seek a declaratory order that the registered right or condition is personal in nature, and therefore not enforceable against successors in title.[37]

The application of certain principles of property law (which at first glance appear to be exceptions to the general principles governing registration) apparently exacerbates

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[33] Section 16 of the Deeds Registries Act 47 of 1937; PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 222.

[34] Section 63 of the Deeds Registries Act 47 of 1937. See also PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 223.

[35] MD Tuba "The legal status of registered home owners' association conditions *Willow Waters Homeowners Association (Pty) Ltd v Koka* (499/2013) [2014] ZASCA 221" (2016) 79 *THRHR* 339-351 339.

[36] 47 of 1937. This provision allows for registration of any real right other than the traditionally recognised real rights.

[37] See also MD Tuba "The legal status of registered home owners' association conditions *Willow Waters Homeowners Association (Pty) Ltd v Koka* (499/2013) [2014] ZASCA 221" (2016) 79 *THRHR* 339-351 339.

the conundrum surrounding the distinction between real and personal rights in land. A prime example is a situation that may arise after conclusion of a real agreement[38] but before its registration in the deeds registry (in other words, before transfer and publicity have been completed) where the owner of immovable property, which is the object or the potential real right, sells it to and registers its title in favour of a third party. The problem associated with non-registration of the potential real right (*in personam ad rem acquirendam*) is that in principle such a right is not enforceable against subsequent acquirers of the land because it remains personal and only binds the contacting parties. Thus, the successor in title of immovable property that is the object (potential) of an unregistered servitude-creating agreement, unregistered mortgage bond-creating agreement, or unregistered long-term lease, is not obliged to fulfil or observe obligations of his or her predecessor in title. From a property-law perspective, the underlying reason is that non-registration of the right implies non-compliance with both the publicity principle and the derivative acquisition requirement. From a contract-law perspective, the basis of this principle is the notion of contractual privity, which entails that a contract only binds parties to it.[39] In other words, in the absence of registration, although a prior unregistered

[38] In terms of a real agreement, the transferor must have the intention to transfer the land or rights to it and the transferee must have the intention to receive transfer of it. Thus, parties must reach a consensus regarding the transfer: PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 220. See also DL Carey Miller *The acquisition and protection of ownership* (1986) 120-123; CG van der Merwe *Sakereg* (2nd ed 1989) 216-217; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 389-390; G Pienaar "The effect of the original acquisition of ownership of immovable property on existing limited real rights" (2015) 18 *PELJ* 1480-1505; G Pienaar "The real agreement as *causa* for the transfer of immovable property" (2015) 78 *THRHR* 47-62 48.

[39] See GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 249.

agreement to transfer or constitute a right (possibly a real right) may entail some immediate use of the land, it remains a personal right and therefore unenforceable against successors in title, save under the doctrine of notice. The doctrine of notice may come to the rescue of the holder of a prior personal right to create a real right by registration. Several aspects of the doctrine of notice are controversial. First, the requirement(s) for the operation of the doctrine of notice are not sufficiently clear.[40] Second, there is uncertainty as to the scope and extent of application of the doctrine.[41] And third, the doctrinal justifications for the doctrine of notice are contentious.[42]

The main objectives of this chapter are, first, to provide an historical overview of the origins and development of the distinction between personal and real rights in Roman and Roman-Dutch law to determine its impact, if any, and its further development in modern South African law. Second, the chapter examines the function of this distinction in property law, and its implications for the doctrine of notice. Third, to describe and analyse the distinction between personal rights and limited real rights in land and to gauge whether the fact that South African property law does not formally adhere to the *numerus clausus* principle exacerbates the conundrum surrounding the distinction. To accomplish these objectives, I examine legislation, case law, and academic literature regarding the distinction between real and personal rights. My hypothesis is that an appraisal of the distinction between the consensual creation of limited real rights and personal rights with a connection to land, in this chapter, will serve as a doctrinal basis for establishing the

[40] This aspect is discussed in chapter 3, section 3 2 of this dissertation.

[41] A discussion of this aspect is in chapter 3, section 3 3.

[42] See chapter 4 of this dissertation for a comprehensive analysis of this aspect.

requirements, scope, and extent of application, and justifications for the doctrine of notice in chapters three and four of this dissertation.

This chapter is divided into seven main sections. The second section provides a brief historical overview of the origins and development of the distinction between real and personal rights. In the third section, I provide a brief outline of the importance of this distinction. The fourth section examines the *numerus clausus* principle and outlines the classic accepted categories of real rights as well as new real rights in land that have developed in South African context. The fifth section analyses the main doctrinal approaches in distinguishing real rights in land from personal rights with some bearing on land. In part six of this chapter, I examine the courts' approach to the distinction between personal and limited real rights in land. The focus in this section is on the courts' application of the judicially-developed dual test (the subtraction from the *dominium* and the intention tests) to determine registrability of rights in land, particularly in cases where parties (or a party) has created or seeks to create a novel type of a limited real right in land. In the final section of the chapter, I offer some conclusions.

2 2 Historical perspective

2 2 1 Introduction

The historical development of the distinction between real and personal rights is complex and has been the subject of academic discourse for centuries. As a result, prominent scholars and legal historians have written profusely on the topic.[43] Arguably, it is

[43] See JE Scholtens "Bartolus and his doctrine of subjective rights" 1958 *Acta Juridica* 163-169; P van Warmelo "Real rights" 1959 *Acta Juridica* 84-98; R Feenstra *Ius in re: Het begrip zakelijk recht in historisch*

impossible to provide a meaningful overview or summary of the origins and historical development of the distinction between real and personal rights in this section. This would probably require a doctoral dissertation on its own. Accordingly, the purpose of this section is neither to paint a complete picture of the origins and historical development of the distinction between real and personal rights, nor to attempt to construe a summary or an overview of such development. The idea is rather to highlight a few important historical markers in a prolonged, complex and contentious process of development. The following parts of the chapter briefly trace the origins and development of the distinction between personal and real rights from its earliest origins through to its codification in certain civilian legal systems during the nineteenth and twentieth centuries. In addition, the discussion also seeks to show the acceptance of this distinction in modern South African property law and to assess the impact of this distinction and its further development.

2 2 2 Early development

The distinction between real and personal rights is one of the most fundamental notions of civilian legal systems because it plays a pivotal role in demarcating the border between the law of property and the law of obligations.[44] For centuries, the origins of the distinction

perspektief (1979); R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120; R Feenstra "*Dominium* and *ius in re aliena*: The origins of a civil law distinction" in P Birks (ed) *New perspectives in the Roman law of property* (1989) 111-122.

[44] *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) paras 31-33. See also R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120 106; AJ van der Walt "Relatiewe saaklike regte?" 1986 *TSAR* 173-179 173; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 170; V Sagaert "Real rights and real obligations in Belgian and French law" in J Milo & S Bartels (eds) *The content*

between real and personal rights has been, and remains, a source of discord.[45] On the one hand, scholars insist that Roman law is a direct source of the distinction.[46] On the other hand, scholars deny its classical or Roman origin.[47] This uncertainty is rooted in scholars' conflicting views on whether Roman law distinguished between *ius reale* and *ius in personam*. The respective Roman texts on which both sets of scholars rely are found in the Digest of Emperor Justinian. This includes Digest 7.1.2,[48] Digest 9.4.30,[49]

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of real rights (2004) 47-70 47; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 59.

[45] See R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120; R Feenstra "*Dominium* and *ius in re aliena*: The origins of a civil law distinction" in P Birks (ed) *New perspectives in the Roman law of property* (1989) 111-122; KGC Reid "Obligations and property: Exploring the border" 1997 *Acta Juridica* 225-245 244.

[46] See Gerhard Feltmann (1637-1696) *Tractactus de iure in re et ad rem* (1666); HF Jolowicz *Roman foundations of modern law* (1957) 74; JE Scholtens "Bartolus and his doctrine of subjective rights" 1958 *Acta Juridica* 163-169 165-168; P van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 86; S Scott "Some thoughts on the law of property in Swaziland" 2006 *CILSA* 153-175 165; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 59.

[47] Ulrich Huber (1636-1694) *Digressiones Justinianeae* (1671). For a comprehensive analysis of the origin of the distinction between real rights and personal rights, and their classification in seventeenth century, see R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120. Feenstra analyses the controversy between the French jurist, Ulrich Huber (1636-1694) and a German scholar Gerhard Feltmann (1637-1696) regarding the Roman origin of the distinction between personal and real rights. Feenstra agrees with Huber that the distinction does not originate from Roman law. See further AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 172; AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 570-571.

[48] In *D* 7.1.2 Celcus states that "[i]n fact, usufruct is a right over a tangible object; if that object is destroyed, the usufruct inevitably goes too." English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian* vol I (1985) 216.

[49] In *D* 9.4.30 Gaius states that "[i]n noxal actions, the rights of those who are absent in good faith are not affected, but when they return, the right to enter a defense is given to them on principles of fairness and equity whether they are owners or whether they have some rights in the property in question, such as a

Digest 39.2.19,[50] and Digest 47.8.2.22.[51] The concept *ius in re* also appears in the *Corpus Iuris Civilis*,[52] and the Institutes.[53]

Scholtens states that the first Romanist to distinguish between *ius reale* and *ius in personam* was Bartolus de Saxoferrato (1313-1357).[54] Van Warmelo asserts that the medieval Romanists should be credited with the fundamental distinction between real and personal rights. He argues further that the distinction is based on the difference between the *actio in rem* (real action) and the *actio in personam* (personal action).[55] Van der Merwe also points out that, historically, the distinction derives from the Roman procedural distinction between *actio in rem* and the *actio in personam*.[56] However, Feenstra

creditor or a usufructuary." English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian* vol I (1985) 388.

[50] In *D* 39.2.19 Gaius states that "[t]he rights of those who are absent in good faith are not prejudiced in a stipulation against anticipated injury; rather, on their return, they have the opportunity of giving a *cautio ex bono et aequo* whether they be owners or have some sort of rights in the matter, for example, as creditor, usufructuary, or holder of a right of *superficies*." English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian* vol III (1985) 303.

[51] In *D* 47.8.2.22 Ulpian states that "[i]n this action we do not inquire whether the thing be among the plaintiff's assets or not, but if it be in fact, the action will lie. Hence, whether it be lent, let, or pledged to me, or deposited with me, so that I have an interest in its not being removed, or if I possess it in good faith or have a usufruct or other right in it, such that I have an interest in its not being forcibly taken, it must be said that I have the action under discussion, so that we do not look for ownership but only for the fact that a thing is alleged to have been removed from among my assets, that is, my possessions." English translation of the *Digest* referred to in this footnote is from T Mommsen, P Kruger & A Watson *The Digest of Justinian* vol IV (1985) 280.

[52] *C* 7. 39. 8.

[53] *I* 4.4.2.

[54] JE Scholtens "Bartolus and his doctrine of subjective rights" 1958 *Acta Juridica* 163-169 167.

[55] P van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 86. See also S Ginnosar "Rights in rem - A new approach" (1979) 14 *Israel LR* 286-336 287.

[56] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 59.

disagrees with this widely accepted notion, and argues that the Postglossators constructed the concepts of real[57] and personal rights.[58] According to Van der Walt, neither the theory of subjective rights,[59] nor the distinction between real and personal rights originated in Roman law.[60] For this reason, Van der Walt finds it incorrect to

[57] The other name given to real rights is *iura in re* and the corresponding term for personal rights is *iura ad rem*.

[58] R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120 106. Feenstra points out that the Postglossators used the concepts *iura realina* and *iura personalia*. According to Feenstra, despite the fact that in the Middle Ages *ius ad rem* was less common than its counterpart *ius in re*, it became the usual term for a personal right later in sixteenth century. He further observes that in the Middle Ages *ius ad rem* could have different meanings and it had special connotations in canon law as well as in feudal law. AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 172 argues that even though the concept *ius in re* occurs in a number of texts in the Digest of Justinian, it is not used in technical sense. Accordingly, it does not create a category that is distinguished in any technical sense from other categories. For a similar view, see also P van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 84.

[59] This theory differentiates between real rights, creditors' rights, personality rights, and immaterial property rights: AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 172.

[60] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 172. The author refers to R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120; R Feenstra "*Dominium* and *ius in re aliena*: The origins of a civil law distinction" in P Birks (ed) *New perspectives in the Roman law of property* (1989) 111-122. AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 584 argues that the approach to the distinction between real and personal rights followed by Grotius and Windscheid is not of Roman origin. He observes that the distinction between ownership as *ius in re sua* and the limited real rights as *iura in re aliena* is of post-medieval origin, and its characteristics are typical of early modern rather than Roman reasoning. Van der Walt contends that the distinction between full ownership and diminutions of it through the creation of limited real rights only became possible once the concept of divided ownership that was still widely recognised and used in medieval legal theory, was abandoned during the seventeenth and eighteenth centuries. For a comprehensive discussion of history and significance of divided ownership, see AJ van der Walt & DG

consider the concepts of *actiones in rem* and *actiones in personam* as a procedural shadow of the modern distinction between real and personal rights. In his view, Roman law is an indirect source of the building materials from which the distinction between real and personal rights later developed; but it is an oversimplification to see the Roman distinction between *actiones in rem* and *actiones in personam* as a prefiguration of the modern distinction between *ius in re* and *ius in personam*.[61] Van der Walt states that the distinction between ownership as a *ius in re sua* and limited real rights as *iura in re aliena* is post-medieval, and its characteristics are typical of early modern rather than Roman reasoning.[62] He points out that the scholars' inclination to ignore the fact that Roman law differs fundamentally from modern law, both in its practical operation and in its theoretical underpinnings, is the source of this oversimplification and may be attributed to the Pandectists.[63]

Kleyn "Duplex dominium: The history and significance of the concept of divided ownership" in DP Visser (ed) *Essays on the history of law* (1989) 213-260; AJ van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *THRHR* 396-420.

[61] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 173. AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 570-571 points out that it is much more acceptable nowadays to argue that there are certain Roman elements in the modern civil law concept of ownership, although many of its essential characteristics derive from later developments. Contra, P van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 85.

[62] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 584.

[63] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 173; AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 570. For similar view regarding legal scholars' tendency to ignore the differences in operation between Roman law and modern law, see the Dutch historian warning, GCJJ van

Feenstra considers Giovanni Pugliese's essay[64] as a middle ground between the two opposing views as to the origins of the distinction between real and personal rights.[65] Pugliese argues that the Postglossators, French, Dutch, and German Romanists puzzled out concept of real right and the distinction between real and personal rights in the sixteenth, seventeenth and eighteenth centuries, but the theoretical concepts on which it was built were already present – albeit in an undeveloped form – in the work of some of the Glossators. The Glossators extracted the concepts of real and personal rights from Roman sources, but that does not mean that the Romans themselves used the concepts.[66] According to Van der Walt, the Glossators did not use the concept *ius in re*

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den Bergh *Eigendome: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 31-32. Van den Bergh states "Het is fantastisch, te veronderstellen dat eigendom precies dezelfde plaats en functie zou hebben in twee maatschappij-stelsels die zo hemelbreed van elkaar verschillen als het antieke Romeinse en het onze." Translated to English this means that "It is fantastic that a fundamental social and legal institution such as ownership could serve the same purpose and take the same form in two societies so radically different as the ancient Roman and the modern Western European. The above translation of Dutch text is borrowed from AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 448. AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 570, in a similar vein to Van den Bergh's observation, states that it would be unrealistic to accept that a legal institution such as ownership could occupy exactly the same place and social function in two societies that differ so widely as those of classical Rome and modern Western Europe. Van der Walt points out that such a presumed similarity of the Roman, pandectist and contemporary perceptions of ownership is a misrepresentation of Roman, medieval and modern law, and tends to obscure the true origin and philosophical foundations of the modern concept of ownership.

[64] G Pugliese "Diritti reali" in *Enciclopedia del diritto* XIV (1964) 755-776.

[65] R Feenstra *Ius in re: Het begrip zakelijk recht in historisch perspectief* (1979) 6-8. See further, AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 172.

[66] G Pugliese "Diritti reali" in *Enciclopedia del diritto* XIV (1964) 755-776. See further AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 172; R Feenstra "Real rights and their

in a technical sense because their approach to and definition of ownership made it unnecessary for them to accord ownership any special position among other real rights. Consequently, they did not draw a clear distinction between a real action (based on ownership) and a personal action (based on obligation).[67] In Van der Walt's view, the technical terms *ius in rem* and *ius ad rem* and the distinction between them, are based on the Postglossators' distinction between *iura re alina* and *iura personalia* and their link to the *actiones in rem* and *actiones in personam* respectively. The Postglossators developed the concept *ius ad rem* as a direct opposite to the *ius in re*. Accordingly, the development of the concept *ius ad rem* prepared the ground for the emergence of the theoretical distinction between real and personal rights in the sixteenth century.[68]

Feenstra was the first to point out that the most significant development in the sixteenth century regarding the distinction between personal and real rights is that of Johannes Apel[69] (1485-1536) who drew a distinction between *ius in re* and *ius ad rem* – the principal division in private law.[70] This is true even though Apel's distinction is not

classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120 106. Contra, P van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 85; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 59.

[67] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 173. See also R Feenstra *Ius in re: Het begrip zakelijk recht in historisch perspectief* (1979) 8-12. However, contra P Van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 86.

[68] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 173. See also P Van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 86.

[69] Johannes Apel *Methodica dialectices ratio ad jurisprudentiam adcommodata* (1535).

[70] R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120 107. Feenstra credits Gerhard Feltmann (1637-1696) for providing the first more comprehensive study of the distinction between real and personal rights. Feltmann was a

consistent in that it fails to allow for a direct contrast between ownership and other real rights.[71] In his earlier publications,[72] Feenstra credited Hugo Grotius (1583-1645) with being the first jurist to provide a theory that made it possible to distinguish between personal and real rights on one hand, and between ownership and limited real rights on the other. However, in a subsequent publication Feenstra conceded that he had been wrong to credit Grotius.[73] Accordingly, Feenstra now credits the French jurist, Hugo Donellus (1527-1591), with first using the term *ius in re aliena* in its technical sense, and for a prefiguration of the fundamental classification of real rights as ownership, and limited real rights.[74] Donellus's theory made it possible to distinguish between personal and real

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Professor of law at the University of Duisburg. Indeed, prior to the publication of Feltmann's monography: *the Tractactus de iure in re et ad rem* (1666), the distinction was discussed in many general works on Roman law or on Natural law in the sixteenth and seventeenth centuries. Feltmann's monograph sparked a controversy between himself and Ulrich Huber (1636-1694). Huber denies the existence of any direct basis for the distinction between *ius in re* and *ius ad rem* in the text of the *Corpus Iuris Civilis*. Furthermore, Huber disagrees with Feltmann's enumeration of real rights. Contra, CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 59. Van der Merwe states that traces of a distinction between real and personal rights as opposed to claims can be found in the glossators, postglossators and the Roman-Dutch writers of the sixteenth and seventeenth centuries. However, it was only the German jurist Heinrich Hahn and several natural law lawyers of the seventeenth and eighteenth centuries who consciously distinguished between real and personal right.

[71] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 174. Van der Walt points out that the development made by Johannes Apel departed from the accepted classification of rights by Gaius who distinguished between *personae*, *res* and *actiones*.

[72] R Feenstra "Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterliche und spatscholastischer Quellen" in O Behrend *et al* (eds) *Festschrift für E Wieacker zum Geburtstag* 70. (1978) 209-234; R Feenstra *Ius in re: Het begrip zakelijk recht in historisch perspectief* (1979) 20-24.

[73] R Feenstra "*Dominium* and *ius in re aliena*: The origins of a civil law distinction" in P Birks (ed) *New perspectives in the Roman law of property* (1989) 111-122 115.

[74] R Feenstra "*Dominium* and *ius in re aliena*: The origins of a civil law distinction" in P Birks (ed) *New perspectives in the Roman law of property* (1989) 111-122 115. See also AJ van der Walt "Personal rights

rights on one hand, and ownership and limited real rights on the other. His theory of rights is, therefore, regarded as a conceptual and doctrinal basis on which the distinction between real and personal rights on one hand, and personal and limited real rights on the other, developed between the sixteenth and nineteenth centuries.[75]

Hugo Grotius (1583-1645) wrote the most important and influential work on the distinction between real and personal rights in seventeenth-century Roman-Dutch law. Based on the distinction drawn by Donellus, Grotius further developed the classification and distinction of rights by dividing patrimonial rights into *beheering* and *inschuld*.[76] The distinction between *beheering* and *inschuld* corresponds to the distinction between real and personal rights. The concept *beheering* is used for patrimonial rights that exist between a person and a thing without reference to any other person. Accordingly, the direct nature of the relationship between a person and a thing plays a central role in the distinction between *beheering* and *inschuld*. The latter is a right that a person has against

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and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 174.

[75] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 175 174. See R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120 106-107. For a detailed analysis of the history of the origin of the distinction between real and personal rights, see R Feenstra "*Dominium* and *ius in re aliena*: The origins of a civil law distinction" in P Birks (ed) *New perspectives in the Roman law of property: Essays for Barry Nicholas* (1989) 111-122 114-115.

[76] R Feenstra "*Dominium* and *ius in re aliena*: The origins of a civil law distinction" in P Birks (ed) *New perspectives in the Roman law of property: Essays for Barry Nicholas* (1989) 111-122 114-115. See also AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 452.

another person, to claim enjoyment of a thing or performance from that person.[77] *Beheering* is divided into *bezitrecht* and *eigendom*, which is further divided into *volle eigendom* and *gebreckelicke eigendom*. *Gebreckelicke eigendom* is again divided, but this time based on the value of each right. The term *gebreckelicke eigendom* is reserved for a landowner's most valuable right (ownership), whereas the less valuable right accruing to any person other than the owner (limited real right), is termed *gerechtigheid*. In distinguishing and classifying rights in this way, Grotius deviated from the medieval tradition by downgrading a number of real rights to the status of less valuable real rights (limited real rights),[78] and by contrasting them with ownership, which is described as the most valuable right.[79] Ownership in its complete or unlimited form is the standard that

[77] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 175; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 452. See also R Feenstra "Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterliche und spatscholastischer Quellen" in O Behrend *et al* (eds) *Festschrift für E Wieacker zum Geburtstag* 70. (1978) 209-234 227.

[78] AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 452 points out that philosophically Grotius' classification of rights in this manner is typically of post-medieval thinking in that it proceeds from the individual legal subject and his rights, and not from the world of objects and their characteristics. Although the distinction does refer back to the Roman distinction between real and personal action, it is clearly a new and typically modern distinction, which highlights the subject, individual person, and his position as against the world of objects and other people. Van der Walt argues that this shift from objectivism to subjectivism and the implication for the creation, interpretation and application of legal principles represent perhaps the biggest philosophical revolution of post-medieval legal theory.

[79] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 176; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 452. See also AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 583.

determines all other classifications.[80] In this way, Grotius actually uses the term ownership for the main category of real rights, and explicitly restricts the traditional definition of ownership as the right of complete disposal over a corporeal property, to full ownership. This bolsters the idea that full and unrestricted ownership determines and dominates the entire paradigm around which the description of real rights centres.[81] Grotius's explanation of unrestricted ownership presumes the absence of limited real rights.[82]

The characteristic nature of real rights as consisting in their capacity to be exercised without reference to any other person, as opposed to personal rights which can be exercised with reference to another person, is an important element of Grotius's distinction between real and personal rights. A real right, therefore, consists of a legal relationship between a person and a thing without reference to other people; whereas a personal right consists of a relationship between two or more persons, possibly in relation to a thing.[83] By analogy, it is possible to contrast limited real rights and personal rights that involve a thing. The former exist without reference to other people, whereas the later

[80] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 583-584; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 452.

[81] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 585; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 452.

[82] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 584.

[83] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 176. See also AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 452.

exists with reference to at least one other person. This classification corresponds to the remedies for the enforcement of the two rights. A remedy for limited real rights (real remedy) can be instituted against any person who happens to breach the right regardless of whether or not he or she is personally bound by the right because the remedy is aimed at a thing and not a person. By contrast, a personal remedy is aimed at and instituted only against a specific person who is bound to the claimant to perform in terms of the creditor's right.[84]

In summary, Grotius divided real rights into two main categories: possession and ownership. He further divided ownership into full ownership and limited ownership based on whether ownership had been reduced through the creation of limited real rights. On creation of a limited real right, both the remaining reduced portion of the original ownership, and the portion of ownership transferred, are referred to as instances of limited ownership. However, for the sake of clarity, Grotius termed the former 'ownership', and the latter a 'limited real right'.[85] Grotius's theory provides that a real right can by nature be exercised without reference to any person, whereas a personal right can be exercised with reference to another person who is bound to the claimant by way of his or her duty to perform, possibly in relation to a thing.

[84] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 176.

[85] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 583. See also AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 177.

Johannes van der Linden (1756-1835), following Grotius, accepted the distinction between a *ius in re* and a *ius ad rem*[86] and between *volkomen* and *onvolkomen eigendom*.[87] Van der Linden distinguished between real and personal right by stating that a holder of a real right may have a right on or to a thing itself, whereas a holder of a personal right may have a right against a person to deliver some or other performance.[88] Indeed, Van der Linden acknowledges the far-reaching difference between real and personal rights – which he described as "*hemelsbreed*"; in simple terms a vast distinction.[89] He emphasised that a real right is a person's right to a thing to the exclusion of others. Thus, a person is closely bound to a thing, whereas in a case of a personal

[86] J van der Linden *Regtsgeleerd practicaal en koopmans handboek* (1806) 1 6 1. AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 177 indicates that the sources referred to by Van der Linden are Grotius and Pothier.

[87] J van der Linden *Regtsgeleerd practicaal en koopmans handboek* (1806) 1 7 1. Van der Linden list the characteristic owner's entitlement as the right to fruit, the right of use, the right to change the form or appearance of the thing, the right to destroy the thing, the right to prevent others from using the thing, and the right to transfer or burden the thing with any right. To a certain extent, modern authors still disagrees about these entitlements. See for example, AM Honoré "Ownership" in AG Guest (ed) *Oxford essays in jurisprudence* (1961) 107-147; C Lewis "The modern concept of ownership of land" 1985 *Acta Juridica* 241-266.

[88] In H Delport & NJJ Olivier *Sakereg vonnisbundel* (1981) 1 quotes from Van der Linden *Regtsgeleerd practicaal en koopmans handboek* 1 6 1 "Voorbedagtelijk zeggen wij, dat de menschen recht hebben op of tot de zaaken: immers dit recht is van tweërleien aart, en in de gevolgen van een hemelsbreed onderscheid.-Recht op eene zaak (jus in re) is dat recht, waar door de zaak zelve aan mij verbonden is, zoo dat ik mijn recht op die zaak zelve vervolge, tegen elken bezitter, wie hij ook zij. – Recht tot eene zaak (jus ad rem, vel in personam) is dat recht, waar door niet de zaak, maar de persoon, met wien ik gehandeld heb, aan mij verbonden is, zoo dat ik allenlijk tegen hem eene actie heb, tot levering der beloofde zaak, of tot de uitvoering der toegezegde daad… ."

[89] JG Horn *The legal effect of rights specific to sectional title property in South Africa, with reference to selected aspects of the Australian and Dutch law* (2017) unpublished LLD dissertation North West University 13.

right, the holder of the right is closely bound to a person with whom he has negotiated or dealt to deliver the thing or performance of specific action. It is clear that Van der Linden agrees with Grotius's distinction[90] which emphasises the direct relationship to or over the thing or "towards" a person.

Notwithstanding the differences in opinion regarding the number of real rights and the controversy regarding whether or not Roman law is a direct source of the distinction between real and personal rights,[91] the majority of seventeenth and eighteenth century Roman-Dutch authors[92] accepted Grotius's distinction between *beheering* and *inschuld* and between *eigendom* and *gerechtigheid*.[93] As it will become clearer below, Grotius's classification and distinction between real and personal rights forms the doctrinal basis for modern South African perceptions of ownership and of patrimonial rights in general.[94]

[90] Grotius distinction between real and personal rights is based on the object of the right.

[91] See R Feenstra "Real rights and their classification in the 17th century: The role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106-120 106-107, 119.

[92] See AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 176 footnote 51.

[93] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 176 and sources cited there.

[94] For a similar view see AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 175; AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 452.

Arguably, Grotius's theory is typified in the so-called "classical theory",[95] and in the wording of section 63(1) of the Deeds Registries Act.[96]

Van der Walt acknowledges Grotius's contribution to the distinction, but argues that Grotius only presented the theory of the distinction between real and personal rights without any great doctrinal or theoretical intentions.[97] He avers that the nineteenth century Pandectists further developed Grotius's theory and as such, it forms an integral part of the doctrinal basis for the distinction between real and personal rights as reflected in the writings of some South African legal scholars.[98]

Accordingly, it is necessary to consider the impact of the nineteenth-century Pandectists. Bernhard Windscheid (1817-1892), a German jurist, stands out among the most influential Pandectists of the nineteenth century.[99] Given his influence on and stature amongst other Pandectists of his time, Windscheid's theory for distinguishing between ownership and limited real rights on one hand, and limited real rights and personal rights on the other, is accepted as a representative example of the Pandectists' views of his

[95] The classical theory is used to distinguish between limited real rights and personal rights involving use of land in South African academic literature. See the discussion of this doctrinal approach in section 2.5 of this chapter.

[96] Act 47 of 1937.

[97] German philosopher Emmanuel Kant (1724-1804) provided Grotius assumptions with doctrinal basis.

[98] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 583. See also AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 175; AJ van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *THRHR* 396-420 406; DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52.

[99] F Giglio "Pandectism and the Gaian classification of things" (2012) 12 *University of Toronto Law Journal* 1-28 6.

time.[100] Windscheid defines ownership in the context of subjective rights[101] with particular reference to the assumption that rights are enforced by the human will. In terms of this theory, legal order issues a principle based on a particular set of circumstance, thereby allowing a specific kind of act, and grants this principle to a specific person for his or her free disposal.[102] Therefore, a person is not forced to act in accordance with the principle, but rather is free to decide whether or not to do so. In addition to the choice to exercise the right, a person can further choose whether to use the judicially provided remedies to enforce his or her freedom in the event of interference or opposition from others. Windscheid states that the will of the person is decisive in the enforcement of the principle laid down by law. Based on this theory, a real right is defined as a power to exercise the will that is conferred by law.[103]

An important aspect of Windscheid's theory of ownership is the distinction between real[104] and personal rights.[105] He describes real rights as rights with regard to which a person's will is decisive for a thing, while the person's will is decisive for actions or

[100] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 572.

[101] Also known as private-law rights.

[102] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 572, citing B Windscheid *Lehrbuch des Pandektenrechts* (1982) 131.

[103] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 572, citing B Windscheid *Lehrbuch des Pandektenrechts* (1982) 131.

[104] B Windscheid *Lehrbuch des Pandektenrechts* (1982) 143.

[105] B Windscheid *Lehrbuch des Pandektenrechts* (1982) 146.

behaviour of a specific person in the case of personal rights.[106] A real right is therefore a right in terms of which the law permits the beneficiary of the right to determine the actions of everybody else with regard to the object of the right.[107] Real rights are essentially exclusive and negative in that they allow the beneficiary to prevent others from performing actions that would interfere with the object or with the beneficiary's own actions with regard to the object.[108] Ownership is distinguished from limited real rights based on the extent of the power to exclude others. Thus, only the owner of the thing has the power to exclude others and to determine their actions with regard to the object in the totality of its relation with the object, while the beneficiary of a limited real right has this power only with regard to certain relations with the object.[109]

It is arguable, that the distinction between real and personal rights as articulated by Windscheid, substantiated by his statement that real rights are absolute rights

[106] B Windscheid *Lehrbuch des Pandektenrechts* (1982) 140. See also, AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 572.

[107] AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 573, citing B Windscheid *Lehrbuch des Pandektenrechts* (1982) 149. For a similar view, see AJ van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *THRHR* 396-420 406.

[108] B Windscheid *Lehrbuch des Pandektenrechts* (1982) 140-141; AJ van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *THRHR* 396-420 406; AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 573.

[109] B Windscheid *Lehrbuch des Pandektenrechts* (1982) 629; AJ van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *THRHR* 396-420 406; AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 573-574.

enforceable against everybody, while personal rights are relative and enforceable only against a specific person or persons,[110] is an example of a personalist theory.[111]

2 2 3 Development in the 19th and 20th centuries

Since the early nineteenth century – for trite reasons such as codified law strengthens legal certainty, foreseeability, and democratic legitimacy, which the law of property also strives to achieve – most civilian legal systems have moved to embody the most important aspects of the distinction between personal and real rights in civil codes. As part of the French Revolution under the rule of Napoleon, the French legislator enacted the French Civil Code (*Code Civil des Français*) of 1804,[112] which came into operation on 21 March 1804. The French Civil Code supposedly contains a closed list of real rights.[113] Arguably, the inclusion of this closed list was a revolutionary reaction against feudal land relationships.[114] Influenced by the French Civil Code,[115] the Netherlands also enacted its first Dutch Civil Code (*Burgerlijk Wetboek - BW*) which came into operation on 1 May

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[110] See AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 573.

[111] See the discussion of this doctrinal approach in section 2.5 below.

[112] Originally the Code was promulgated under the name Civil Code of the French, but was renamed the Napoleonic Code from 1807–1815, and was again renamed Civil Code of the French.

[113] The categories of the Napoleonic Code were not founded on earlier French laws, but drawn from Justinian's sixth century codification of Roman law. Thus, the *Corpus Juris Civilis* and the *Institutes*. See I Stewart "Mors codicis: End of the age of codification?" (2012) 27 *Tulane European & Civil Law Forum* 17-47 23-24.

[114] V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141 120-121.

[115] See G Meijer "The influence of the Code Civil in the Netherlands" (2002) 14 *European Journal of Law and Economics* 227-236 230-231.

1809 and its Old Civil Code entered into force on 1 October 1838.[116] The Dutch Civil Code has been amended several times most recently in 1992.[117] Germany also enacted the German Civil Code (*Bürgerliches Gesetzbuch - BGB*) which came into operation on 1 January 1900.[118]

When the Dutch settlers established a refreshment post at the Cape of Good Hope in 1652, they brought Roman-Dutch law with them.[119] In 1806, the Cape Good Hope was taken over by the British, who enacted the first Charter of Justice in 1826. The Charter created a new Supreme Court, headed by a Chief Justice and two other judges who were appointed from the bars of the United Kingdom. The Charter explicitly stated that the substantive law to be applied by the courts was Roman-Dutch law, but afforded the judges the autonomy to formulate their own procedural law.[120] Consequently, South African common law is characterised as a mixed or hybrid legal system due to its origins and its application of both civil law (Roman-Dutch law) and common law (English law).[121]

As stated above, Roman-Dutch law[122] has been an integral part of South African law since its adoption in the seventeenth century. South African courts still apply

[116] A Fontein "A Century of Codification in Holland" (1939) 21 *Journal of Comparative Legislation and International Law* 83-88.

[117] Article 5:1 provides for property rights.

[118] Property rights are provided for in § 903 of the German Civil Code.

[119] L du Plessis *An introduction to law* (3rd ed 1999) 49.

[120] See FDJ Brand "The role of good faith, equity and fairness in the South African law of contract: The influence of common law and the Constitution" (2009) 126 *SALJ* 71-90 71; HJ Erasmus "The history of the rule-making power of the Supreme Court of South Africa" (1991) 108 *SALJ* 476-484.

[121] Other jurisdictions classified as mixed are Louisiana, Scotland and Sri Lanka.

[122] The seventeenth century Dutch jurist, Simon van Leeuwen coined this term in the title of his book, *Het Roomsch Hollandsch Recht* (1664).

principles of Roman-Dutch law.[123] These principles form a major part of uncodified South African private law, including the principles that provide for the distinction between real and personal rights.[124] The fact that South African property law has not been codified implies that in principle common law still regulates issues relating to private property law. Inevitably, this allows parties greater freedom to create new types of limited real rights in land. However, such rights must still comply with the registration requirements (set out in registration legislation) and common-law principles – which determine the content, creation, transfer, and termination of rights in land. As will appear in the remaining parts of this chapter, the South African registration legislation embraces the common-law principles regarding the distinction between personal and real rights in land.

Notably, Grotius's classification and distinction of rights in the seventeenth century as further developed by other Roman-Dutch authors and the Pandectists in the eighteenth and nineteenth centuries, are an integral part of the South African doctrinal basis for distinguishing between real and personal rights. Arguably, Grotius's theory is the basis for the subtraction from the *dominium* test" developed by the courts.[125] As appears below in section 2 6 3, an investigation into the origins of the subtraction from the *dominium* test shows that it appeared for the first time in case law during the last decade of the

[123] See F du Bois "Sources of law: Common law and precedent " in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 64-99 67; R Zimmerman "'Double cross': Comparing Scots and South African law" in R Zimmerman, D Visser & KGC Reid (eds) *Mixed legal systems in comparative perspective* (2004) 1-33 4-6; AJ Kerr "The reception and codification of systems of law in Southern Africa" (1958) 2 *JAL* 82-100 82.

[124] See in general M Nathan *Common law of South Africa* vol II (1904) 934-5. See also MJ De Waal "Numerus clausus and the development of new real rights in South African law" (1999) 1.

[125] This aspect is discussed in section 2 6 3.

nineteenth century.[126] Furthermore, the courts' application of the subtraction from the *dominium* test in early cases arguably led to the formulation of section 63(1) of the Deeds Registries Act,[127] which the courts still apply today to determine the nature and registrability of rights.[128]

2 2 4 Critical assessment

It has emerged from the above overview of the historical origins and development of the distinction between real and personal rights, that this distinction is complex and controversial. Certain scholars insist that Roman law is a direct source of the distinction between personal rights and real rights, whereas others deny the Roman origin of the distinction. The prevailing view is that the Postglossators and French, Dutch, and German Romanists constructed the distinction during the sixteenth, seventeenth and eighteenth centuries, but the theoretical concepts from which it was developed were already present in an undeveloped form in the writings of some of the Glossators. The influence of the Pandectists on certain scholars appears to be the main element of their argument in favour of a Roman origin for the distinction.

It is also apparent that since the early nineteenth century most civilian legal systems have moved to include a closed list of real rights in land in their civil codes. This

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[126] See in particular *Consistory of Steytlerville v Bosman* (1893) 10 SC 67 69; *Hollins v Registrar of Deeds* 1904 TS 603 607.

[127] 47 of 1937.

[128] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA); *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA); *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA); *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017).

has the effect of moderating or limiting the scope of party autonomy in the law of property by prescribing the nature and content of rights which parties may create by consensus. Contrary to civilian legal systems, South African private law deals with the distinction between real and personal rights in a completely different way. In South African law, the distinction as regards land is to some extent addressed in legislation dealing with the registration of rights in land and registration formalities. Furthermore, as will become clear in section 2.6 below, South African courts' application of common-law principles regarding the creation, transfer, and termination of real rights, together with principles that determine the content of real rights, serve as supplementary mechanisms which limit party autonomy in property law. Thus, South African property law does not formally follow the *numerus clausus* principle. This triggers the research question that this chapter aims to investigate – Does such non-adherence to the *numerus clausus* principle leaves a door open for unregulated party autonomy to create new categories of limited real rights in land outside the traditionally recognised categories such as servitudes, mortgage bonds, and long-term leases? In other words, whether and to what extent party autonomy in the South African land registration system allows for the creation of novel types of limited real right in land.

Accordingly, the remainder of this chapter focuses on how the legislative measures, the courts' application of common-law principles which govern the law of property, and South African academic authors deal with the conundrum surrounding the distinction between limited real rights in land and personal rights that may involve use of land. I start with the significance of the distinction between personal rights and limited real rights. An illustration of how certain of the civilian legal systems have embodied the

numerus clausus principle in their civil codes given which, in turn, forms the basis for highlighting categories of real rights in land traditionally recognised in South African property law and the new types of limited real right in land which have developed. This is important because the tendency in South African case law is that the nature and content of a new type of limited real right is, to a certain extent, influenced by the nature and content of the analogous real right which provides the basis for its recognition.[129]

2 3 The significance of the distinction

In South African private law, the distinction between real and personal rights is important in that, firstly, it determines how a real or personal right is created.[130] Different legal rules apply to how these rights are transferred – real rights are transferred either by registration (in case of immovable property) or by delivery (in case of movable property); while personal rights are transferred by cession.[131] Secondly, proprietary remedies protect real rights whereas contractual and delictual remedies protect personal rights.[132] Therefore, to identify which remedy to apply in protecting either a personal or a real right, it is vital to establish the nature of the right at the outset. Thirdly, real rights are enforceable against

[129] On this point see CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 802.

[130] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 38 state that both real and personal rights are property rights for purposes of constitutional property law, regardless of whether they qualify as real rights in terms of private-law doctrine. JD van der Vyver "The doctrine of private-law rights" in SA Strauss (ed) *Huldigingsbundel vir Joubert WA* (1988) 201-246 223 states that the distinction between real rights and personal rights has remained significant for purposes of deeds registration only.

[131] Section 16 of the Deeds Registries Act 47 of 1937. See further H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 47.

[132] See AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 39.

the world at large, but personal rights generally bind only a specific person or a defined group of persons.[133] Hence, the nature of a right determines the extent to which, and against whom, the right is enforceable.[134] Arguably, the distinction between real and personal rights forms the basis for the division of the law of property in its broadest sense into the law of things and the law of obligations.[135]

2 4 The *numerus clausus* principle and recognised categories of real rights

2 4 1 Meaning and function of the numerus clausus

The *Numerus clausus* principle is one of basic principles of the law of property.[136] Depending on the nature of interpretation, the term *numerus clausus* may have two distinct meanings. Interpreted more widely (thus, in its traditional sense), the *numerus clausus* concerns the content of full ownership rights in both tangible, whether movable or immovable, and intangible assets such as shares, debts and intellectual property rights. Interpreted narrowly, *numerus clausus* refers to the categories or types of limited

[133] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 39.

[134] H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 47.

[135] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 50; CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-428; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 184. JD van der Vyver "The doctrine of private-law rights" in SA Strauss (ed) *Huldigingsbundel vir Joubert WA* (1988) 201-246 is of the view that the distinction has become obsolete in South African law. However, AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 237 argue that Van der Vyver's view is inspired by a particular terminological framework that does not find general support in case law or doctrine.

[136] CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 803.

real right in the tangible property of another.[137] Accordingly, its purpose in this sense is to restrict the creation of new categories or types of limited real right outside of the traditional and established categories such as servitudes, mortgage bonds, or hypothecs, and registered long-term leases.[138] It therefore serves to ensure certainty and predictability in the law of property.[139]

Struycken explains thst the *numerus clausus* concept concerns the general principle that the number of property rights is limited and these rights are not susceptible to radical expansion or modification by individual parties to meet their specific wishes and needs. This implies that the law of property is mandatory; there is no room for party autonomy.[140] Van der Merwe states that the *numerus clausus* principle entails that only recognised categories of real rights can be constituted and that the content of recognised real rights is rigid and not susceptible to radical change by the party (or parties) creating a specific right.[141] Van der Walt indicates that the purpose of the *numerus clausus* and other anti-fragmentation strategies is to restrict the creation not of new individual rights,

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[137] THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 61. See also AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* (2017) *TSAR* 408-420 408-409.

[138] CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 802-803. See also MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 3.

[139] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 48.

[140] THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 59.

[141] CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 802-803. See also MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 3.

but of novel categories or types of limited real right outside of the established traditional categories such as praedial and personal servitudes, mortgage bonds or hypothec, and long-term leases.[142]

The consensus in academic circles is that the disadvantage of a legal system that does not subscribe to the *numerus clausus* principle is that its flexibility – which allows the creation of new kinds of real right in land by consensus – may lead to fragmentation of land ownership. In its traditional sense, fragmentation of land ownership occurs when a legal system recognises multiple types of ownership rights in land that are held simultaneously by different people as happened in feudal times.[143] Feudal law recognised *dominium directum*, *dominium utile,* and *quasi dominium*.[144] The difficulty with fragmented landownership is that it is inevitably relative to the extent to which it becomes difficult to enforce it "against the whole world."[145] The enforceability against the whole

[142] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 410, footnote 7.

[143] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 408.

[144] See AJ van der Walt & DG Kleyn "*Duplex dominium*: The history and significance of the concept of divided ownership" in DP Visser (ed) *Essays on the history of law* (1989) 213-260; AJ van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *THRHR* 396-420; AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 408. It is worth noting that this fragmented property rights have been replaced by modern forms of fragmented property rights in terms of the common law (co-ownership), or legislation (sectional titles, share blocks and property time-sharing). In other words, the modern forms of fragmented property rights are doctrinally and constitutionally acceptable as modern versions of fragmented property rights.

[145] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* (2017) *TSAR* 408-420 408.

world is the hallmark of real rights.[146] Van der Walt explains that in modern times a return to fragmented feudal land relationships (*splitting up* of ownership) is highly improbable, at least in civilian legal systems. Therefore, fragmentation of landownership remains a threat only to the extent that unchecked proliferation of limited real rights in land (*splitting off* of limited real rights) might reach a point where either the combined burden imposed by layers of multiple limited real rights, or the recognition of one particularly corrosive limited real right, erodes the residuary ownership of the landowner to such an extent that it becomes meaningless. According to Van der Walt, an example of a particularly corrosive right of this nature would be a permanent and transferrable right of usufruct. Indeed, an unchecked proliferation of limited real rights in land does not refer to the number of rights that are created, but to a virtually unlimited range of different rights, resulting in layers of multiple overlapping rights in the same land.[147]

2 4 2 Foundations of the numerus clausus principle

In order to prevent fragmentation of landownership, most civilian legal systems tend to focus on strategies around the *numerus clausus* principle that have an effect that only a closed list of limited real rights are recognised in civil codes. However, the foundation of the *numerus clausus* principle in most of these legal systems appears somewhat complex and controversial. The general opinion is that the *numerus clausus* principle has its origin in French private law, which provides other European legal systems with the basis of the

[146] See GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 249.

[147] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 409.

principle.[148] Arguably, the inclusion of a closed list of real rights in the French Civil Code was a revolutionary reaction against feudal land relationships towards the end of the eighteen century.[149] Sagaert summaries the general view regarding the foundations of the *numerus clausus* principle as follows:

> "The feudal system was founded in the mixing of obligatory duties and property rights. The entitlement to a layer of a 'property right' could entail numerous personal and positive duties in relation to the feudal Lord. The interconnection between personal obligations and property rights was the legal basis for a social model that the early 19th century legislator aimed to abolish. In acting against this structure, property law would have to be defined in a stricter fashion, and delimited in a clear manner, in order to take away the legal foundations of the feudal system. The strict limitation of the number of property rights would therefore be the legal counterpart of party autonomy in the field of obligations."[150]

Sagaert regards the origin of the *numerus clausus* principle with suspicion. He points out that a closer look at the French Civil Code indicates that to seek the origin of the *numerus clausus* principle in a revolutionary reaction against the feudal system is hazardous. This not only emerges from the absence of express recognition of the *numerus clausus* in the

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[148] V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141 120. See also THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 65-66.

[149] V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141 120-121.

[150] V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141 120.

French Civil Code, but also from the system for the transfer of movable rights which the French legislator has adopted. Thus, a closed list of real rights is not found in the Civil Code or in any other statutory provision.[151] Sagaert points out that the only general foundation for the *numerus clausus* principle in the French Civil Code would be a declaration by Treilhard – one of the drafters of the preparatory works for the Code.[152] Based on developments in case law, which appear to have abandoned strict adherence to the *numerus clausus* principle, and prevailing view among leading French scholars, Sagaert concludes that French law does not adhere strictly to the *numerus clausus* principle.[153] Belgian law inherited the French Civil Code. In Belgian law, however the tendency appears to be adherence to the *numerus clausus* principle.[154]

The Dutch *numerus clausus* principle is supposedly a German concept attributable to the nineteenth century Pandectists. The *numerus clausus* principle and other fundamental principles were incorporated into the 1900 draft of the *Bürgerliches Gesetzbuch*. One of the great German jurists of the nineteenth century, Friedrich Carl von

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[151] V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141 120-122. For a similar view, see THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 65.

[152] V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141 120-122.

[153] V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141 123.

[154] V Sagaert "Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 119-141 125.

Savigny (1779-1861), developed the idea that the restrictions on party autonomy in the law of property formed an essential model of German private law. This led most Dutch scholars to accept that the Dutch *numerus clausus* principle was founded on nineteenth-century German legal thinking.[155] However, Struycken is of the view that the Dutch *numerus clausus* of property rights, was incorporated in very clear words in early drafts of the Dutch Civil Code around 1800, most articulately in the 1816 draft by Joan Melchior Kemper (1776-1824).[156] According to Struycken, Kemper's draft explicitly indicates that the only rights a person could have in the property of another are the rights recognised in the Code, and that all other rights are personal in nature. Dutch Civil Codes modelled on the French Civil Code replaced the early drafts of the 1800 Dutch Civil Code. Struycken explains that a provision in the old Dutch *Burgerlijk Wetboek* of 1838 contained a non-exhaustive catalogue of real rights, similar to the rights listed in the French Civil Code. As a result, nineteenth century Dutch courts followed a flexible approach to party autonomy in the creation of new types of property rights outside the scope of the rights listed in the old *Burgerlijk Wetboek*.[157] The *numerus clausus* received a warmer reception in nineteenth century Dutch doctrine than in the courts. Nineteenth century prominent Dutch scholars tended to adhere to a strict interpretation of the old *Burgerlijk Wetboek*; the statutory provisions were their main focal point when describing and analysing the limits of the law of property.

[155] THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 64.

[156] THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 64.

[157] THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 65.

The French author Demolombe (1804-1887) influenced the Dutch writer Diephuis to favour the idea of strict adherence to the *numerus clausus* principle as opposed to the French courts' approach of that time which favoured a more prominent role for party autonomy in property law. The approach of Diephuis and Opzoomer in adhering to the closed list of real rights became so deeply entrenched in Dutch legal thinking that the in 1905 the Dutch *Hoge Raad* cemented the *numerus clausus* principle in Dutch law. Consequently, Struycken concludes that *numerus clausus*, as the expression of the will of legislature, has been part of Dutch legal thinking since the era of codification in the early nineteenth century. However, he points out that the works of Savigny and the Pandectists fleshed out this principle, resulting in the acceptance of *numerus clausus* or the closed system of real rights in the law of property.[158] Indeed, several provisions in the 1992 Dutch Civil Code embody the *numerus clausus* principle. They refer generally to types of property rights and types of situations that have a statutory basis.[159] Because of

[158] THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 65-66.

[159] Article 3:81 (1) BW contains general rules on the acquisition of property rights, implicitly requiring a statutory basis for each type. It states, "He who is entitled to an independent and transferable right can, within the boundaries of that right, create a limited property right that are mentioned by the statute." Article 3:277 (1) BW refers to the quality of creditors "except for grounds of preference that are recognised by statute." Article 4:42 (1) BW defines a disposition by last will and testament as "a unilateral legal act [..], that is provided for in Book 4 BW or is recognised as such by statute." Under a wider interpretation of the *numerus clausus*, there also exist some rules on transferability. Article 3:83(1) BW states that (i) the ownership of things, (ii) limited property rights and (iii) debts transferrable unless a statutory provision or the nature of the right dictates otherwise. Article 3:83 (3) BW states that rights other than ownership, limited property rights and debts transferrable only if the statute so provides. Article 3:80 (3) and 3:80 (4) states that assets are acquired or lost in the manner prescribed for each type of asset by statute. The translation of the articles of the BW mentioned here is borrowed from THD Struycken "The *numerus clausus* and party

its mandatory wording, Article 3:84(3) BW may be accepted as one of the foundations of the *numerus clausus* principle in modern Dutch property law.[160]

2 4 3 Recognised categories of real right in South African law

Van der Merwe indicates that the reason for a closed system of real rights in Roman law was to avoid ownership of land being burdened by a plethora of rights binding successors in title.[161] Roman law had a *numerus clausus* of real rights and these were ownership (*dominium*),[162] servitude (*servitutes*),[163] *pignus,* and *hypotheca*.[164] *Emphyteusis*

autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 61-62.

[160] Article 3:84 (3) reads, "A juridical act intended to transfer property for purposes of security or which does not have the purpose of bringing the property into the patrimonium of the acquirer, after transfer, does not constitute valid title for transfer of that property." See further THD Struycken "The *numerus clausus* and party autonomy in the law of property" in R Westrik & JA van der Weide (eds) *Party autonomy in international property law* (2011) 59-82 62.

[161] See CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 802-803.

[162] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 237. See further PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 47. Ownership is the only real right with regard to one's own property (*ius in re propria*), while a right in a thing, belonging to another person is referred to as a limited real right (*ius in re aliena*). A limited real right is a real right less than ownership in a thing owned by a person other than the holder of such right.

[163] Both praedial and personal.

[164] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 47-48. See CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 803; JAC Thomas *Textbook of Roman law* (1976) 195-210. A limited real right is a real right less than ownership in a thing owned by a person other than the holder of such right.

(hereditary lease of land) and *superficies* (hereditary building right) were also real rights recognised in Roman law.[165]

Early Roman-Dutch law inherited a closed system of real rights from Roman law. However, the Roman-Dutch system of *numerus clausus* was breached by the introduction of feudal rights.[166] Accordingly, Roman-Dutch law did not have an effective closed system of real rights.[167] The most important categories recognised by Roman-Dutch law scholars were ownership, possession,[168] the right of an heir to inheritance, servitudes, mortgage, pledge, a building grant, a perpetual quitrent, and various feudal rights. While a lessee (other than a hereditary building lease and hereditary lease of land) did not have a real right in Roman law, the Roman-Dutch law lessee of land was protected against all subsequent owners and third parties by the *huur gaat voor koop* rule. Arguably, a real right replaced the lessee's personal right in cases where the *huur gaat voor koop* rule applied.[169]

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[165] CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 803.

[166] CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 803.

[167] P van Warmelo "Real rights" 1959 *Acta Juridica* 84-98 87. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 48. CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 803.

[168] Roman-Dutch writes differed in their opinion regarding whether or not possession constitutes a real right: PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 48.

[169] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 48. See also CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 803. For application of this rule see WE Cooper *Landlord and tenant* (2nd ed 1994) 274.

The Dutch Civil Code of 1809 had a closed list of real rights. South Africa adopted Roman-Dutch law around 1700 with the result that most of the developments in Dutch law after 1700 were not transplanted into South African law. Following the Roman-Dutch law of around 1700, South African law does not formally recognise a closed system of real rights.[170] At the same time, South African law is more conservative than the Roman-Dutch law of that period because possession and the right of an heir to claim his or her inheritance, are not recognised as real rights.[171] Apart from ownership – potentially the most complete and "absolute"[172] real right when compared to limited real rights[173] –

[170] CG van der Merwe *Sakereg* (2nd ed 1989) 468.

[171] MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 3. See also CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-444 421; CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 804.

[172] There are four perceptions from which the idea of absoluteness is understood. In this regard see P Dhliwayo *A constitutional analysis of access rights that limit the landowners' right to exclude* (2015) unpublished LLD dissertation Stellenbosch University 89-96.

[173] This is according to the traditional perception of ownership as an absolute, exclusive and abstract right. Over the years, this perception dominated South African legal theory and case law. The proponents of the perception of ownership as absolute contend that the supposedly absoluteness of ownership originated and is sanctified by Roman and Roman-Dutch law. An example in this regard is DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 70-73. Cowen's view is that there is complete identity between the Roman law, Roman-Dutch law, and modern concepts of private ownership. This is clearer from his statement that "throughout the Middle Ages, the great commentators on the Roman law, from Bartolus to Donellus, were busy expounding and giving precision to the ideas concerning the attributes of ownership to be found in the *Corpus Iuris Civilis*, and especially to the idea of plena in re peseta's." However, Cowen suggests that the traditional view of landownership as an absolute is no longer acceptable in the modern socio-economic context (see especially in page 67). Accordingly, Cowen calls for radical transformation of the concept of landownership. K Reid & CG van der Merwe "Property law: Some themes and some variations" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective* (2004) 637-670 659-660 appear to hold a similar view to that of Cowen. They point out that in the tradition of the *ius commune*, ownership is still at

the beginning of the twenty first century considered as absolute, exclusive and abstract in nature. See further, CG van der Merwe *Sakereg* (2nd ed 1989) 171. However, DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 43 argues that the Roman-Dutch law was not characterised by the notion of ownership as being absolute. Moreover, Roman-Dutch law is not the source for the absolute view of ownership, as it sometimes accepted in South African legal theory and case law, because private law restrictions on ownership had always existed. Visser argues, "[a]lthough Bartolus describes ownership as the right to deal with a thing in a *complete* way ('perfecte disponere'), this is not intended to convey an absolutist idea of ownership." C Lewis "The modern concept of ownership of land" 1985 *Acta Juridica* 241-246 242 drew attention to the extent to which the institution of ownership has changed over the centuries. She observes, "[a] careful examination of the institution of ownership will show that our courts do indeed attempt 'jealously' to protect ownership - but only against the intrusion of third persons. However, when one looks at the content of the right, particularly in relation to land, it will be seen that it is a paltry right so whittled away by legislation in the past century that it cannot be equated with the ownership of classical Roman law or even the right as it was envisaged by the Roman-Dutch writers." The Dutch historian, GCJJ van den Bergh *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 31-32 warns against the tendency or misconception of regarding the concept of ownership as having the complete identity in Roman law, Roman-Dutch law and modern law. According to Van den Bergh, it is difficult to believe that a fundamental social legal institution such as ownership could serve the same purpose and take the same form in two societies so radically different as the ancient Roman and modern Western European. AJ van der Walt "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 450 argues that in Roman law, "ownership was not only restricted in fact, but it was also never regarded or described as fundamentally absolute or unrestricted, and the factual existence of restrictions are accepted and described as natural aspect of ownership, not as exceptions." Furthermore, JRL Milton "Ownership" in R Zimmermann & DP Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 696-697 contends that "[i]t is due to the pervasive influence of Pandectist scholarship that the concept of ownership is generally described and understood as 'absolute' in nature." According to Milton, the Pandectists had influence on the South African conceptual basis of ownership since the beginning of the twentieth century. The Pandectists influence, says Milton, became apparent as South African lawyers began to treat the German scholar as if they were institutional writers on Roman-Dutch law. Milton points out that the authoritative and influential exposition of South African property law of property provided by CG van der Merwe in his textbook *Sakereg*, first published in 1979 and then in 1989, illustrate the extent of adoption of the Pandectist version of property law. Milton argues that Van der Merwe's work is much influence by C Asser *Handleiding tot de beoefening van het Nederlands burgerlijk recht zakenrecht: Algemeen deel* (1985) 4-45; C Asser *Zakenreccht: Eigendom en beperkte zakelijke genotsrechten* (1990) 13-28. The basis of Asser's work is Pandectist version of property law. For further analysis of the "absoluteness" of ownership idea, see P Birks

categories of real rights recognised and encountered in practice include servitudes, restrictive covenants, real security rights, mineral rights, mining rights, and registered long-term leases.[174] A real right in the form of a hereditary building lease does not apply in South African law.[175] On the other hand, South African law apparently recognises new categories of real rights, such as the right to labour tenancy, sharecropping (recognised in case law), and sectional title ownership and initial ownership (recognised in terms of legislation).[176] South African law also recognises novel personal servitudes such as servitudes that resemble praedial servitudes in content, but are registered as personal servitudes (*servitutes irregulares*), restrictive conditions, and other novel rights that are

"The Roman law concept of dominium and the idea of absolute ownership" 1985 *Acta Juridica* 1-37; AJ van der Walt "The fragmentation of land rights" (1992) 8 *South African Journal on Human Rights* 431-450 433. For a recent comprehensive analysis of the "absoluteness" of ownership idea, see P Dhliwayo *A constitutional analysis of access rights that limit the landowners' right to exclude* (2015) unpublished LLD dissertation Stellenbosch University 25-102. For case law regarding the notion of ownership as absolute, see *Johannesburg City Council v Rand Townships Registrar* 1910 TS 1314; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Gien v Gien* 1979 (2) SA 1113 (T). It is therefore acceptable that the idea of ownership as "absolute" is likely to have been influence by Pandectist scholarship of the nineteenth century.

[174] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 48. Because of the enactment of the Mineral and Petroleum Resources Development Act 28 of 2002, what used to be mineral rights and mining rights, were replaced by new statutory real rights, namely prospecting rights and mining rights to minerals and exploration rights and production rights to petroleum.

[175] With regard to other real rights that were transplanted from Roman-Dutch law and recognised in South African law, see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 49.

[176] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 49. See also CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *SALJ* 802-815 806-810; MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 3.

registered as personal servitudes.[177] Furthermore, new praedial servitudes such as the right to open windows over the servient land, the servitude to fetch footballs, a servitude to restrict a new form of nuisance caused by the use of neighbouring land,[178] and a praedial servitude of storage of water and of parking bays, have been developed in South African law.[179] Other servitudes recognised in South African law include the right of trekpath, a trading servitude, the right to name a structure on the servient land, and the right to a reserved parking space.[180]

It is generally accepted that so long as a legal system insists on a roughly rigid closed system of limited real rights, the classification of rights as limited real rights and personal rights would seldom cause difficulties. Hence, the very fact that South African law does not formally recognise a closed system of limited real rights supposedly exacerbates the conundrum regarding the demarcation between limited real rights and personal rights. Since it is in principle possible in South African law to create new types of limited real right, difficulties arise when one must determine whether a consensually-created right or condition that does not fit any of the recognised categories of real rights mentioned above, is real or not.[181]

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[177] CG van der Merwe *Sakereg* (2nd ed 1989) 509. See also AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 410.

[178] JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 584-584.

[179] CG van der Merwe & JM Pienaar "Law of property (including real security)" 2008 *ASSAL* 965-1057 1029-1030.

[180] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 412-416.

[181] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 49. See AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 39.

Van der Walt and Maass explain that the real difficulty with the distinction between real and personal rights is, for all practical purposes, restricted to instances where a use right with regard to someone else's land could be either a limited real right (in which case it must be registered to establish the real right), or a personal right (in which case it may not be registered).[182] When these use rights are created by contract or in a will, it is not always easy to establish beforehand whether the right should fall into one or the other category. This difficulty is particularly pronounced in situations where the parties intend to create a limited real right which does not fit into one of the acknowledged categories of real rights. The question is whether the right is real or not and whether it may (and must) be registered? A real right requires registration to trigger its existence, whereas registration is not a requirement for the existence of a personal right. Therefore, an unregistered potential real right remains a personal right and does not bind successors in title, save where the doctrine of notice applies.[183]

Strictly speaking, in practice the problem with the nature of rights only arises in cases involving corporeal immovable property,[184] because section 63(1) of the Deeds Registries Act[185] requires registration of real rights in land. The effect of registration is that it publicises the existence of a real right which is, therefore, enforceable against successors in title. The definition of a real right includes any right which becomes a real

[182] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 39.

[183] See further AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 39.

[184] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 39; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 179.

[185] 47 of 1937.

right upon registration,[186] but registration does not convert a personal right into real right. Indeed, this definition is circular and does not help in determining whether a right is real or not.[187] In addition, section 63(1) of the Deeds Registries Act explicitly provides that personal rights may, subject to a few exceptions, not be registered. However, the Act offers no definition of a personal right.[188] Badenhorst, Pienaar and Mostert suggest that a better definition of a personal right in the context of section 63(1) of the Deeds Registries Act, is a condition which does not restrict the right of ownership.[189] Moreover, section 3(1) of the Act imposes a duty on the registrar of deeds to register specific categories of real right as well as *any real right not specifically mentioned in subsection 1*. The latter section makes it possible for the registrar of deeds to register any condition or right which in his or her view subtracts from the owners' dominium.

2 4 4 Critical assessment

The *numerus clausus* principle entails that only recognised categories of real rights can be constituted and that the content of these rights is rigid and not susceptible to radical change by the party (or parties) creating that specific right. In view of the discussion in the preceding section, it is clearer that the *numerus clausus* principle occupies a distinct and important place in civilian legal systems. It is also apparent that the prevailing view

[186] S 102 of the Deeds Registries Act 47 of 1937.

[187] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 49.

[188] See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 50.

[189] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 50.

is that the creation of the *numerus clausus* principle at the end of the eighteenth century was a revolutionary reaction against feudal land relationships. The problem with fragmented ownership of land is that it is inevitably relative to the extent that it becomes difficult to enforce the right against the whole world. Since the beginning of the nineteenth century, most civilian legal systems have tended to adhere to the *numerus clausus* principle, and as a result, they have incorporated a closed list of real rights in their civil codes. The prevailing custom in civilian legal systems is that any modification or creation of a new type limited real right in land can only be through legislation and not by parties' consensus in a contract or in a bequest in a will. Thus, the property law system inherently curtails party autonomy in the interests of legal certainty and predictability.

Contrary to civilian legal systems, South African property law does not formally adhere to the *numerus clausus* principle. Accordingly, over the years there has been a notable acceptance and recognition of new types of real right through the development of the common law by the courts. The question, therefore, is whether, and if so, to what extent, this flexible approach which allows creation of new types of real right by parties' consensus, poses a threat to the property law system. The remainder of this chapter is devoted to a discussion of the South African courts' approach to the distinction between personal and limited real rights in land. More specifically, the courts' application of the judicially developed dual test (the subtraction from the *dominium,* and intention tests) to establish the registrability of rights in land – particularly where parties (or a party) create or seek to create a novel type of a limited real right in land. My hypothesis is that an analysis of the courts' approach should help to establish whether non-adherence to the *numerus clausus* principle leaves the door open for unchecked creation of new types of

real right in land by consensus, which might result in fragmentation of landownership in the narrow sense. I start with the analysis the main doctrinal approaches applied in distinguishing real rights in land from personal rights with some connection to land.

2 5 Doctrinal approaches to the distinction

The analysis in the preceding sections indicates that South African property law does not formally recognise a *numerus clausus* of real rights in land. This means that in principle South African property law allows for the creation of new types of limited real right in land. Over the years both academic literature and case law have developed theoretical approaches and tests that seek to clarify the distinction between limited real rights and personal rights. Before providing a comprehensive analysis on how South African courts deal with problems surrounding the distinction between real and personal rights in land in section 2.6, the discussion below focuses on the most significant theoretical approaches that seek to clarify the hurdle caused by the apparent similarity between limited real rights and personal rights in land. The two main theoretical approaches are the classical theory and the personalist theory.[190]

[190] Other theories such as the theory of subjective rights, the registrability of rights, relative real rights and the prototype approach are not discussed here. For criticism of these theories, see CG van der Merwe *Sakereg* (2nd ed 1989) 60-63; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 189-194; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 50-57; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994); JC Sonnekus "Gebrek aan wetenskap vervlak regspraak tot kasuïstiek - *Willow Waters Homeowners Association (Pty) Ltd v Koka* (768/13) 2014 ZASCA 220 (12 12-2014)" (2015) *TSAR* 405 407-408.

It is usually accepted that the classical theory originated in Roman law,[191] but a plausible view is that it is of Pandectist origin.[192] The classical theory entails that real rights have a thing as their object and thus cover relationships between a subject and a thing.[193] Personal rights, in terms of the classical theory, have a performance as their object and thus relate to relationships between two persons – even though the relationship might have some indirect bearing on land.[194] In this sense, a real right establishes a direct legal connection between a person and a thing and, therefore, the holder of a real right can exercise control over the object of his or her right, within the limits of law, without reference to another person.[195] In terms of the classical theory, a personal right involving a thing has a performance as the object of the right. There is, therefore, a relationship between the holder of a right and another person who must perform as prescribed by the right. If the personal right relates to a thing or physical object,

[191] CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-444 429.

[192] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 185 states that the classical theory is based on the distinction between real and personal rights as it was described by Grotius.

[193] The classical theory reflects the description and distinction between real and personal rights as developed by Hugo Grotius and subsequently further developed by Roman-Dutch authors and the Pandectists in the eighteenth and nineteenth centuries. Arguably, Grotius' theory is the basis for the judicially developed subtraction from the *dominium* test, which led to the formulation of section 63(1) of the Deeds Registries Act 47 of 1937 that the South African courts applies (together with the intention test) to determine the nature and registrability of rights.

[194] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 184. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 50.

[195] See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 50; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 184.

the relationship between the holder of the personal right and the thing is secondary or mediated and not direct.[196]

The classical theory is not immune to criticism. First, its critics argue that the theory overlooks the fact that personal rights also constitute reciprocal legal relationships between legal subjects.[197] Secondly, certain personal rights, such as a lease of movable property, also affect control over a thing to some extent.[198] Lewis argues that the classical theory describes the consequences of the right rather than its essential character. She acknowledges the immunity that the holder of a real right enjoys against divestment, but contends that we do not know that this immunity exists unless we know that the right is real.[199]

Van der Walt and Maass maintain the view that the importance of the classical theory in distinguishing real rights from personal rights lies in the fact that real rights are characterised by a direct bond between the subject and the thing. A personal right, on the other hand, can only imply an indirect bond between a person and a thing as the right can only be enforced through another person.[200]

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[196] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 51; AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 40.

[197] See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 51.

[198] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 51.

[199] See C Lewis "Real rights in land: A new look at an old subject" (1987) 104 *SALJ* 5099-615 612.

[200] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 40. See also AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 185, who states that the value of the classical theory lies in a central moment of truth, namely that real rights are characterised by a direct bond between the subject and the thing, without any reference to any other person.

The personalist theory distinguishes between real and personal rights with regard to the persons against whom the respective rights are enforceable. It holds that a real right is enforceable "against the whole world" (*erga omnes*).[201] In other words, a real right is enforceable against anyone who interferes with the legal relationship between the holder of a real right and the thing, and who disregards the holders' entitlement to the thing.[202] In terms of the personalist theory, personal rights are only enforceable against a specific person who is bound to perform in terms of a contract or other obligation.[203] By virtue of this contrast, real rights are "absolute" rights, whereas personal rights are relative in nature.[204] In effect, the personalist theory provides that limited real rights are valid against the original owner's successors in title, whereas personal rights are not – unless a different rule such as the doctrine of notice applies.

Critics of the personalist theory argue that real rights do not always operate absolutely.[205] Lewis, for example, argues that the personalist approach is unsatisfactory for the identification of essential and characteristic attributes of a real right. Moreover, it is of no assistance, says Lewis, in determining whether a particular right is real or personal. The personalist theory describes the consequence of the right rather than its

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[201] The personalist theory reflects the description and distinction real and personal rights as articulated by Bernhard Windscheid, who is one of the prominent Pandects of the nineteenth century. This theory is mirrored in the intention test that the South African courts still apply even today (together with subtraction from the *dominium* test) to distinguish real from personal rights that has some bearing on land.

[202] H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 45.

[203] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 40. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 51; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 186.

[204] H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 45.

[205] See C Lewis "Real rights in land: A new look at an old subject" (1987) 104 *SALJ* 5099-615 609.

essence.[206] Van der Merwe and Pope argue that the owner's *rei vindicatio* may be limited against a *bona fide* acquirer of the thing on the basis of estoppel and, if a pledgee alienates the pledged object voluntarily, he or she may not claim subsequently claim it from a *bona fide* purchaser.[207] Secondly, the fact that a personal right binds a particular person does not imply that third parties must not respect a personal right. Hence, the argument is that third parties must respect both real and personal rights.[208] In summary, Van der Merwe and Pope argue that the emphasis on the absolute nature of a right excludes a satisfactory distinction between real and other subjective rights, such as personality rights and immaterial property rights.[209] Badenhorst, Pienaar and Mostert state that a personal right operates absolutely to a certain extent. The basis of this argument is that an intentional infringement of a personal right generally constitutes an actionable wrong entitling the injured party to redress.[210]

Notwithstanding the critics' arguments, Van der Walt and Maass contend that the personalist theory remains useful because it illustrates the difference between real and

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[206] C Lewis "Real rights in land: A new look at an old subject" (1987)104 *SALJ* 5099-615 610.

[207] CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-444 442. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 52.

[208] CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-444 428. See also. AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 40.

[209] CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-444 429.

[210] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 52. CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-444 state that if a third party wilfully interferes with the contractual relationship between of others, either of the contractors may claim delictual liability from the wrongdoer.

personal rights in relation to other persons. Thus, the object of a personal right involves a person who must give effect to an agreement, while enjoyment or enforcement of a real right does not involve any other person and is not aimed at performance by a specific person.[211] They acknowledge that both real and personal rights are protected against outside interference, but contend that only limited real rights are enforceable against successors in title and the holder of a limited real right can, therefore, compel any new owner of the object to give effect to the content of the holder's limited real right. If a third party interferes with a personal right, the holder of the right would be able to claim damages for any loss arising from that interference. On the other hand, if a third party obstructs the entitlements of the holder of a limited real right, that holder would be entitled to claim restoration of the prior position directly as his or her remedies differ from personal remedies in the sense that they are proprietary.[212] In other words, both personal and real rights are protected absolutely from outside interference, but only the holder of a limited real right can compel any successor in title of the original owner of the object to adhere to the extant limited real right.[213] Van der Walt and Maass insist that the description of a real right in terms of the personalist theory should be distinguished from the general claim that any right is protected against interference by third parties, because law protects both

[211] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 41. See also AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 184.

[212] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 41.See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 51.

[213] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 41; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 188.

real and personal rights against outside interference.[214] In the context of land, the personalist theory is, therefore, helpful but not decisive in differentiating between the enforcement of real and personal rights against successors to land.[215]

It is clearer from the above brief authoritative overview of the two theoretical approaches used to distinguish real rights from personal rights in land that neither theory is Roman in origin since Roman lawyers did not theorise. Both theories appear to have emerged much later. It is also apparent from the preceding overview that neither theory is decisive or unequivocal in making the distinction, but both can provide some assistance in individual cases. It appears that the crucial issue in the context of personal or limited real rights in land is the extent to which these rights can be enforced directly against new owners of the land.

2 6 The approach of South African courts to the distinction between personal rights and limited real rights

2 6 1 Introduction

South African courts have developed a twofold test, which is used as a *priori* criterion to determine whether a right or condition in relation to land is real and, therefore, registrable

[214] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 40.

[215] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 41; AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 189.

in the deeds registry.[216] In *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others*,[217] the Supreme Court of Appeal formulated the twofold test as follows:

> "To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied:
>
> 1. The intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors-in-title; and
>
> 2. The nature of the right or condition must be such that registration of it results in a 'subtraction from *dominium'* of the land against which it is registered."[218]

The intention test focuses on whether parties intended to create either a limited real right or a personal right, while the subtraction from the *dominium* test[219] focuses on whether a right or condition in question restricts the exercise of any right of ownership.[220] The courts' approach has been to first scrutinise the intention of a party (the parties) before examining

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[216] For most recent analysis of the twofold test, see PJ Badenhorst "New real rights to land in South Africa: A twofold test" (2015) 4 *Prop LR* 197-206 198; PJ Badernhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 221.

[217] 2001 (3) SA 569 (SCA).

[218] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) para 12.

[219] The subtraction from the *dominium* test is discussed in section 2 6 3 below.

[220] PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 221 credits CG van der Merwe *Sakereg* (2nd ed 1989) 70 for the formulation of the twofold test. This formulation was approved by the court in *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A) 885B. For analysis of earlier formulations of the test by the courts, see PJ Badenhorst & PPJ Coetser "The subtraction from the dominium test revisited – Pearly Beach Trust v Registrar of Deeds" (1991) *De Jure* 375-389 380-383.

whether the right or condition,[221] if registered, could result in a subtraction of *dominium* of the land against which it is registered.[222] A similar approach is followed in this section.

2 6 2 Intention test

In terms of the intention test the testator or the contracting parties must have the intention to bind the present landowner in his or her capacity as landowner and not in his or her personal capacity.[223] An important indication of such an intention is where the terms of a bequest in a will or the contract between the parties make it clear that not only the present owner or transferee, but also his or her successors in title would be bound to give effect to an obligation embodied in the will or in a condition in a contract. The fact that the parties agreed that not only they, but also their successors in title would refrain from exercising a certain entitlement inherent in the right of ownership, or to suffer something being done in respect of the land, is indicative of an intention to create an obligation, which would be

[221] PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 223 is of the view that the intention test should only be used once it has been determined by the application of the subtraction from the *dominium* test that the right in question is capable of becoming a real right or as a supplementary test to the subtraction from the *dominium* test. See further PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 57.

[222] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA). See further *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA); *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA); *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017).

[223] CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-444 434.

a burden upon the land – although, importantly, it need not be the only indication of such an intention.[224]

In *Lorentz v Melle and Others*,[225] the court considered whether the intention of the parties was to create a personal or a real right. According to the court, it is a matter of interpretation of the deed of sale to determine whether a real or personal right was intended.[226] The court referred to the 1918 Appellate Division judgment *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*,[227] where it was stated that

> "[w]hether a contractual right amounts in any given case to a servitude - whether it is real or only personal - depends upon the intention of the parties to be gathered from the terms of the contract construed in the light of the relevant circumstances. In case of doubt the presumption will always be against a servitude, the *onus* is upon the person affirming the existence of one to prove it."[228]

The court in *Lorentz v Melle and Others* made it clear that the parties' intention to create a real right is not a sole criterion in deciding whether a real right has been created. If a contractual right is of such a nature that it is incapable of constituting a servitude, the intention of the parties (as expressed) to do so is irrelevant.[229]

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[224] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 57.

[225] 1978 (3) SA 1044 (T).

[226] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1050F.

[227] 1918 AD 1 16.

[228] See also *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A) 406; *Edelor (Pty) Ltd v Champagne Castle Hotel (Pty) Ltd and Another* 1972 (3) SA 684 (N) 689-690.

[229] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1050H, 1055G.

In *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others*,[230] the high court – after scrutinising the deed of sale – held that the parties intended the first condition to operate between them alone. Hence, the parties did not have the intention to create a real right, which would be binding on their successors in title.[231] With regard to the second condition, (which was held not registrable because it did not curtail the owner's right of enjoyment of the property in the physical sense) the court pointed out that,

> "[o]nce it is clear that the right in question is not a real right but only a personal right, the whole exercise is done."

Citing *Lorentz v Melle and Others,*[232] the court found it unnecessary to inquire into the intention of the parties regarding the second condition because,

> "[e]ven if the parties intended it to be a real right, their intention cannot elevate what is personal right into a real right."[233]

The court further emphasised that the erroneous registration of a purely personal right does not transform it into a real right.[234] In short, the intention of the parties to create a real right is only relevant if the right is capable of being a real right. If the parties'

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[230] 1999 (2) SA 419 (T).

[231] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 438G.

[232] 1978 (3) SA 1044 (T) 1050H, 1055G.

[233] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 436B-C.

[234] See *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 43B-E.

agreement is to create a right, which is personal in nature and not real, the right is also not registrable.

In *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others*,[235] the Supreme Court of Appeal also referred to the requirement that any transfer of ownership should be accompanied by the intention to transfer and receive the property. It pointed out that the basis for the decision of the court must be that the transferor and the transferee intended to pass and receive transfer of the properties subject to the burdening conditions.[236] The court held that Capex intended to pass transfer of the properties subject to the conditions, and that Armscor (the original owner) had the intention to receive the properties subject to the conditions. The court construed Armscor's intention from the fact that it never claimed rectification of the deed in terms of which the properties were transferred to it, and that it never denied its intention to receive the properties subject to the conditions. Furthermore, Armscor never complained about the existence of the conditions or about the wording of the conditions of the deed of transfer.[237] In addition, Armscor consensually agreed to the cancellation of the conditions insofar far as they applied to the smaller parcels of land. The latter fact was of particular importance in that it indicated that Armscor had full knowledge of the terms of the conditions but did nothing to deny their application. Hence, the court concluded that Armscor intended to receive transfer of the properties subject to the conditions. The court explained that Denel had

[235] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA).

[236] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 577G.

[237] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 577H-I.

failed to challenge the conclusion that Capex and Armscor had not intended to pass and receive transfer of the properties subject to the conditions.[238]

In *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others*,[239] the Supreme Court of Appeal had to decide whether the provisions in a title condition registered against the title deed of land preventing its transfer without a clearance certificate from the Homeowners' Association, constituted a real or a personal right. The condition or embargo was intended to create a real security right. The court examined whether the parties had the intention to create a real right, which is binding on their successors' in title. The title deed in question did not explicitly state that the embargo on transfer was binding on successors in title. The court pointed out that the intention of the parties to the title deed must be gleaned from the terms of the instrument, construed in the light of the relevant and admissible context, including the circumstances in which the instrument came into being.[240]

In determining whether such intention was indeed present, the court took several factors into account. First, the local authority required that the developer of the property estate insert the title condition as a pre-condition to authorising the subdivision of the land, which had to be followed by the registration of the subdivision by the registrar of deeds.[241] Secondly, the purpose of the title condition was to create a general security

[238] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 577G-578C.

[239] 2015 (5) SA 304 (SCA).

[240] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) 310F-311A.

[241] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) 311B.

right for payment of a debt.[242] Thirdly, the use of generic, unqualified terms such as "owner" and "any person" in the title condition, must include every subsequent owner or holder of a real right in the property from time to time.[243] Fourth, there was prohibition on the transfer of the property to the purchaser, unless the purchaser, upon accepting the transfer, undertook to become a member of the association. Consequently, the purchaser was bound by the rule of the homeowners' association, and the court held that the parties intended to create a real right.[244] Interestingly, this decision deals with a real security right and not a servitude, which is the context of most of the other decisions.[245]

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[242] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) 312A.

[243] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) 312B.

[244] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) 312C.

[245] The Supreme Court of Appeal made no bones about it that the embargo provision must be upheld on public policy grounds. It stated clearly that the withdrawal of such an effective mechanism for ensuring the efficient collection of levies, would saddle the association with enormous costs together with dire consequences on its ability to run the community scheme (residential estate). The inability to collect debts owed would for example, adversely affect the credit standing and ability of homeowners associations to secure finance for carrying out unexpected essential services (para [29]). It is evident that the Supreme Court of Appeal had placed considerable value on the financial needs of homeowners' associations, which were considered to be the same as sectional title bodies corporate. In this regard, the Supreme Court of Appeal have overstepped the boundaries of interpretation and entered into the field of law-making. For criticism of this decision, see JC Sonnekus "Gebrek aan wetenskap vervlak regspraak tot kasuïstiek - *Willow Waters Homeowners Association (Pty) Ltd v Koka* (768/13) 2014 ZASCA 220 (12 12-2014)" 2015 *TSAR* 405-431 especially 426-427; T Maree "Home owners associations: *Willow Waters* – Standing of levies reassessed. Some random thoughts" 49 (January 2015) *MCS Courier* 5; R Brits *Real security law* (2016) 390. Arguments against recognising that this particular title condition constitutes a real right are the following: First, the condition is not really property-like, without a close connection to the land such as restrictive conditions. Second, the condition in effect constitutes a new form of security in terms of which the homeowners association must first be paid before transfer can take place. This militates against the fact that South African law recognises a *numerus clausus* of real security rights. Third, commercial transactions in landed property would decrease if a proliferation of real burdens on land were allowed. The law should therefore be slow in recognising new real burdens on land.

In *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016),[246] the Supreme Court of Appeal had to decide whether conditions registered with the title deed, created either a real or a personal right. If the latter, whether such a debt had prescribed and became unenforceable as envisaged in section 11*(d)* of the Prescription Act,[247] as more than three years had elapsed after it had fallen due. The first condition obliged the transferee or its successors in title to erect a dwelling on the property within a period of eighteen months. The second condition provided that if the transferee or its successors in title failed to erect the dwelling within that period, the appellant would be entitled, but not obliged, to have the property re-transferred to it against return of the purchase price.[248] The court held that the first condition reflected an intention to bind not only the transferee, but also its successors in title[249] and resulted in an encumbrance upon the exercise of the owner's rights of ownership of its land and therefore gave rise to a real right.[250]

In light of the discussion above, it is clear that the intention test is unproblematic and relatively straightforward.[251] Strictly speaking, the intention of the parties (a party) to create a real or personal right should be gleaned from the terms of the contract or deed

[246] [2017] ZASCA 141 (2 October 2017).

[247] 68 of 1969.

[248] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 12.

[249] Issues surrounding the second clause is dealt with in section 2 6 3.

[250] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 13. The court relied on *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) para 16 & 22.

[251] See also W Freedman "The application of the *numerus clausus* principle in South African property law: An assessment of *Willow Waters Home Owners Association (Pty) Ltd v Koka NO*" (2015) 1.

of transfer. Thus, the testator or the contracting parties must have the intention to bind the current landowner in his or her capacity as landowner, and not in his or her personal capacity. If it is not clear from the bequest of a right in a will, contract, or deed of transfer, the assumption should be against the creation of a real right. Accordingly, the onus to prove the existence of the alleged or potential real right is on the person claiming it. Furthermore, if the right or condition is capable of becoming a real right but an intention of the grantor or parties in a contract to bind successors in title is lacking, a real right does not come into existence.

2 6 3 The subtraction from the dominium test

2 6 3 1 Introduction

Since the early 1890s, South African courts have formulated what has become known as the 'subtraction from the *dominium* test' to explain the distinction between real and personal rights.[252] In one of the earliest reported cases, *Consistory of Steytlerville v Bosman*,[253] the then Supreme Court held that:

> "There are certain known incidents to property and its enjoyment, which are recognised by the law. Servitudes, for instance, both praedial and urban, are burthens with which land may be affected in favour of persons, other than the owner. They are real rights which have been carved out of the full *dominium* of the owner and transferred to others, but they can only be enjoyed by the transferee, so long as he is

[252] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 66; PJ Badenhorst & PPJ Coetser "*Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C)" (1991) 24 *De Jure* 375-389 380-381; PJ Badenhorst "Registrability of rights in the deeds registry: The twofold test revisited" (2018) 2 *Stell LR* 220-236 223.

[253] (1893) 10 SC 67.

> the owner of the dominant tenement, in respect of which the right has been created."[254]

In another early case, *Hollins v Registrar of Deeds,*[255] the Transvaal court held that in terms of the common law only,

> "[t]he transfer of land, burdens upon the land, mortgage bonds, encumbrances, - that is, *jura in re* constituted against the land, such as servitudes and portions of the *dominium* parted with could be registered in land register."

The registration of an "encumbrance contained in a deed of transfer" by virtue of section 3(i) of Proclamation 10 of 1902 (T) was interpreted as follows:

> "Encumbrance means a real burden on the land, portion of the *dominium* parted with by the owner."[256]

Badenhorst and Coetser indicate that the significance of the decisions in *Consistory of Steytlerville v Bosman*[257] and *Hollins v Registrar of Deeds*[258] lies in the fact that the idea that whenever something inherent in ownership was extracted from it and transferred to another person who could exercise such entitlement, the right encompassing such entitlement is real and therefore registrable, had already been established.[259]

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[254] *Consistory of Steytlerville v Bosman* (1893) 10 SC 67 69.

[255] 1904 TS 603 605.

[256] *Hollins v Registrar of Deeds* 1904 TS 603 607.

[257] (1893) 10 SC 67 69.

[258] 1904 TS 603 607.

[259] PJ Badenhorst & PPJ Coetser "*Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C)" (1991) 24 *De Jure* 375-389 380-381.

In the sections that follow, I discuss in detail and analyse cases in which the subtraction of *dominium* test has been applied to determine whether a particular condition created in a contract or bequest in a will restricts the exercise of ownership in respect of land, and is therefore registrable.

2 6 3 2 Ex parte Geldenhuys

Ex parte Geldenhuys[260] is the most important of the early cases dealing with the subtraction from the dominium test.[261] In *Ex parte Geldenhuys*,[262] Mr Adriaan Geldenhuys and Mrs Gesina Elizabeth Maria Geldenhuys were married in community of property. They executed a joint will in which they bequeathed certain land to their five minor children in equal shares subject to a life usufruct of the survivor of the testators. The will also contained the following conditions:

> "As soon as our first child reaches his or her majority, the survivor of the testators shall be bound to subdivide the said land in equal portions and distribute it among the children, such distributions to be made by the survivor and such major child by drawing lots […] and we declare and direct that the child who by such lot obtains the portion comprising the homestead of the farm Jakhalskop shall pay the sum of £200 to our other children' within a specified time."[263]

[260] 1926 OPD 155.

[261] PJ Badenhorst & PPJ Coetser "*Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C)" (1991) 24 *De Jure* 375-389 380-382. See also AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 180.

[262] 1926 OPD 155.

[263] *Ex parte Geldenhuys* 1926 OPD 155 156.

After the death of his wife, Mr Geldenhuys (the survivor and executor of the joint estate) sought an order instructing the registrar of deeds to register the transfer of certain land in undivided shares in the names of the children. He further sought an order to allow him (in his capacity as executor of the estate) to have the land surveyed into equal portions by drawing of lots, and asked the court to appoint a responsible person to act on behalf of the eldest child and himself to subdivide the land. Geldenhuys also sought an order to allow him (in his capacity as father and natural guardian) to pass a bond on the portion accruing to minor child who may obtain the homestead of the land.[264]

The registrar of deeds first argued that usufructs are not registrable unless they are created by means of a reservation of a usufruct upon transfer of the land. Consequently, rights created in a will are not registrable. The court analysed the nature of and the distinction between personal and praedial servitudes. It pointed out that personal servitudes should not be confused with personal rights because all servitudes are real rights once they have been properly constituted, and all servitudes should be registered. Personal servitudes are constituted in favour of a person without reference to his or her being the owner of any particular land, whereas praedial servitudes are constituted in favour of a particular piece of land (dominant tenement), but both are burdens upon the servient tenement and reductions in the ownership of that tenement. Consequently, the court held that a usufruct is a personal servitude, which is a burden upon the land enforceable against all subsequent owners of the land.[265]

[264] *Ex parte Geldenhuys* 1926 OPD 155 156.

[265] *Ex parte Geldenhuys* 1926 OPD 155 163-164.

Second, the registrar of deeds refused to register the condition regarding the time at which and manner according to which the subdivision of the land had to occur, and the obligation compelling the child drawing the portion that included the homestead to pay a sum of money to the other children. The basis of the refusal to register the condition was that it created only personal rights and not real rights in the land. The registrar of deeds therefore argued that even if the condition were to be registered, it would only bind the legatees and no other third party to whom the legatees might transfer their undefined shares before partition.[266]

The court had to decide whether the condition established a real or personal right.[267] The court formulated the distinction between real and personal rights as follows:[268]

> "[W]hen it is said that 'personal rights' cannot be registered against the title to the land, the reference is not to rights created in favour of a 'person', for such rights may be real rights against the land. The reference is to rights which are merely binding on the present owner of the land, and which thus do not bind the land, and do not constitute *jura in re aliena* over the land, and do not bind the successors in title of the present owner. These are the 'personal rights' which are not registrable, […] One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some

[266] *Ex parte Geldenhuys* 1926 OPD 155 157.

[267] *Ex parte Geldenhuys* 1926 OPD 155 162.

[268] *Ex parte Geldenhuys* 1926 OPD 155 163-164.

> person or other, the corresponding right is a personal right, or right *in personam*, and it cannot as a rule be registered."[269]

In applying the distinction between real rights and personal rights to the case at hand, the court dealt with whether the condition as regards the timing and manner by which the subdivision of the land had to occur, amounted to a subtraction from the *dominium*. The condition provided that the subdivision of the land into defined portions was to take place as soon as the eldest surviving child reached majority, and the subdivision was to be decided by drawing lots, which was to be performed by the surviving testator and such major child.

The court pointed out that the common law allows each owner of an undivided share to claim a partition at any time. A co-owner can claim that a partition be effected either by agreement or by a court order. In this case, the will, therefore, modified the common-law right of a co-owner of an undivided share. Portions of the *dominium* of an owner of an undivided share in property can be disposed of, just as can portions of the *dominium* of an owner of a defined share.[270] The rights of the co-owner involving partition can, therefore, be validly limited by last will. The court made it clear that the conditions

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[269] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 56 submit that that this is merely a different way of saying that the duty concerned, namely to refrain from exercising a certain entitlement inherent in the right of ownership or to suffer something being done in respect of a thing, should not rest upon any particular owner in his or her personal capacity, but that it should attach to the thing itself, thus "running with the thing," as it was put in *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 (4) 490 (E) 509. The court per Reynolds J stated that "personal obligations binding upon a particular owner while he is owner, as distinct from real rights […] cannot 'affect the land'. They only affect the owner and are binding on him. They do not 'run with the land' of affect it, but are attached to the owner."

[270] *Ex parte Geldenhuys* 1926 OPD 155 164.

regarding the subdivision of the land form a real burden (*jus in re*) on each undivided share, and not merely an obligation on the person of each child. The court held that,

> "those limitations as to the time and mode of partition so directly affect and adhere to the ownership of the undivided shares, that they must almost necessarily be regarded as forming a real burden or encumbrance on that ownership."[271]

In other words, the condition regarding the time and manner according to which the division of the land had to occur amounted to a subtraction from the *dominium* because it limited the co-owners' entitlement to demand partition of the land at any time and to determine how the division should occur. Accordingly, the condition was registrable.[272]

With regard to the obligation to pay sum of money to the other children, the court held that it was personal in nature (*jus in personam*) because it was an obligation resting on the one child in his or her personal capacity, without in any way diminishing her ownership in the land. The court pointed out that an,

> "obligation to pay money cannot easily be held to form a *jus in re*, unless it takes the form of a duly constituted hypothec; moreover the obligation is altogether uncertain and conditional, for it is impossible to foretell what the drawing of lots will decide."[273]

The court expressly held that the obligation to pay a sum of money to other children does not "constitute a real right and is not *per se* registrable."[274] Yet, notwithstanding that the

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[271] *Ex parte Geldenhuys* 1926 OPD 155 164-165.

[272] *Ex parte Geldenhuys* 1926 OPD 155 164-165. For authority, the court relied on *Ex parte Mulder* 1924 CPD, where the court ordered that land should be transferred to certain legatees in undivided shares subject to a condition (imposed by the will) that upon partition a certain one of those legatees should receive the homestead and certain land around it.

[273] *Ex parte Geldenhuys* 1926 OPD 155 165.

[274] *Ex parte Geldenhuys* 1926 OPD 155 165.

obligation could not constitute a real right upon registration, because of the close connection between the two obligations, the court allowed its registration together with the registrable condition regarding the time and manner according to which the subdivision of the land had to occur.[275] The proviso in section 63(1) of Deeds Registries Act[276] has now given effect to this arrangement. The proviso allows registration of a condition in a deed that does not restrict the exercise of any right of ownership, if in the opinion of the registrar of deeds such a condition is complementary or otherwise ancillary to a registrable right contained in a notarial deed. In *Ex parte Geldenhuys*, the court made it clear that the co-registration was allowed for practical purpose only; the registration does not transform or convert the condition regarding payment of money into a real right.[277]

Following the formulation of the subtraction from the *dominium* test in *Ex parte Geldenhuys*,[278] the legislature formulated a similar test to determine the registrability of rights in section 63(1) of the Deeds Registries Act.[279] Section 63(1), without its proviso, reads as follows:

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[275] The court further explained its decision to allow the registration of the condition which does not create a real right together with a registrable condition as follows: "If the direction as to the time of the partition and the drawing of lots were registered, without the direction as to the payment of the £200, the result would be an incorrect representation, and an imperfect picture of the testamentary direction, which would be most misleading to strangers who may purchase undivided shares from the children before the partition takes place. It seems to me therefore that in the special circumstances of the ease the difficulty can only be solved by registering the entire clause of the will." See *Ex parte Geldenhuys* 1926 OPD 155 165-66.

[276] 47 of 1937.

[277] *Ex parte Geldenhuys* 1926 OPD 155 165.

[278] *Ex parte Geldenhuys* 1926 OPD 155 163-164.

[279] Act 47 of 1937.

> "No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration."

De Waal indicates that the subtraction from the *dominium* test presupposes that a person's ownership of land is diminished or curtailed by granting another person a real right with regard to the land. In other words, a real right which another person holds with regard to one's own land, results in a subtraction from or diminution of the normal powers of use, enjoyment, alienation, or disposal inherent in one's ownership. Only a right that has this effect on a person's ownership of land is by nature real and thus registrable.[280] In terms of the subtraction from the *dominium* test, the holder of a right must acquire an interest in the land rather than a claim against the owner.[281]

Van der Walt indicates that the decision in *Ex parte Geldenhuys*[282] creates the impression that (at least in the former Orange Free State) any right or condition that relates to payment of a sum of money will probably not be regarded as a real right which can be registered under section 63(1). This seems to be the case even if the sum of money dervies from the use or exploitation of land, and even if the condition appears to create a servitude that allows the beneficiary (either in person or as owner of another piece of land) the benefit of a particular profit in the form of a servitude.[283]

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[280] MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 6.

[281] CG van der Merwe & A Pope "Property" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 405-444 435. See also AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 42; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 56.

[282] 1926 OPD 155.

[283] AJ van der Walt *The law of servitudes* (2016) 386.

Although the application of the subtraction of the *dominium* test does feature in cases decided before 1926, *Ex parte Geldenhuys*[284] was a pivotal moment in the development of the test. This case is important because the court enunciated one of the most frequently cited and authoritative formulations of the subtraction from the *dominium* test. From there on, South African courts applied the subtraction from the *dominium* test,[285] and do so even today, to determine whether a particular right or condition created in a contract or will is a real or personal right.[286]

2 6 3 3 Lorentz v Melle and Others

In *Lorentz v Melle and Others*,[287] the court had to decide whether certain conditions in a notarial deed registered against the title of land, created real or personal rights. The conditions were contained in a notarial deed of subdivision entered into by Johannes Gerard Van Boeschoten and Henricus Lorentz, before they acquired a farm in co-

[284] 1926 OPD 155 164.

[285] See *Schwedhelm v Hauman* 1947 (1) SA 127 (E) 135; *Ex parte Pierce* 1950 (3) SA 628 (O) 636D; *Fine Wool Products of Extensions Africa Ltd v Director of Valuations* 1950 (4) SA 490 (E) 499A; *Odendaalsrus Gold, General Investment and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O) 605D-E 606C-D; *Hotel De Aar v Jonordan Investments (Edms) Bpk* 1972 (2) SA 400 (A) 405D; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1050E; *Kain v Khan* 1986 (4) SA 251 (C) 257; *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C); *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A); *Felix v Nortier* [1996] 3 All SA 143 (SE) 148F-G 153D-E; *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 (2) SA 419 (T) 434B 435B; *Cape Explosives Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) 578D-E; *Nkosi v Bührmann* 2002 (1) SA 372 (SCA) 387H-I.

[286] For recent case law where the courts applied the test, see *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 13; *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) paras 16 & 22; *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA).

[287] 1978 (3) SA 1044 (T).

ownership. They agreed to have one part of the farm registered in Van Boeschoten's name, and another part in Lorentz's name while remaining co-owners of the remaining part.[288] The notarial deed further provided if either of them was to establish a township on his separate part of the original farm, the other would acquire a claim for one-half of the nett profits from the sale of erven in that township. The conditions were embodied in notarial deeds and registered against the title deeds of both properties, in effect creating a burden against the subdivided properties.

Before the original co-owners died, their respective portions were subdivided into a number of smaller units. One of the portions of the farm which belonged to Van Boeschoten was sold to Melle (the first respondent), whereas some of the portions which belonged to Henricus Lorentz were transferred to the applicant.[289] The conditions in regard to sharing in one-half of the nett profits from the sale of erven remained registered for more than fifty years – even after the land had subsequently been further subdivided into smaller parts. Melle intended to sell her portion of the land to a company which intended developing a township on the land.[290] To ensure that the purchaser would not be obliged to pay over half of the nett profits that may accrue to it from the establishment of a township, Melle sought a declaratory order regarding the nature of the registered rights of landowners to share in half of the nett profits. She argued that the registration of the conditions had been erroneous in that they created personal rights between the original co-owners and, therefore, did not bind subsequent owners of the land.[291] Finding

[288] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1045B-D.

[289] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1046G.

[290] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1047E-1048C.

[291] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1047E-H.

in favour of Melle, a single judge in the court *a quo* held that the conditions created personal rights and not real rights. Lorentz appealed against that order to a full bench of three judges.[292]

On appeal, the question was whether the court *a quo* had been correct in holding that the conditions in question created personal rights and not real rights. To support the argument that the conditions created real rights, Lorentz argued first, that the conditions and subsequent registration of the notarial deed created real rights in form of praedial servitudes. Therefore, the conditions were binding on all successors in title of the original co-owners, including the respondent. Secondly, the original co-owners' intended to create praedial servitudes. The first argument compelled the court to analyse the principles relating to the creation and nature of servitudes in South African law.[293] Hence, the approach of the court was to consider the right created by the condition as a servitude.

Lorentz argued that there was in principle no reason why the right of an owner to participate in the profit from township development on the neighbouring property could not be a praedial servitude. Arguing that as much as the rights of an owner to grazing, quarrying, woodcutting, or water from adjacent land could constitute a praedial servitude, there was no reason why the right to participate in the civil fruits (income) from land could not equally be a praedial servitude. The right would raise the value of the dominant tenement as it gave its owner a claim to half the profits accruing to the owner of the servient tenement consequent upon its sale, or the sale of erven which form part of it,

[292] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1045A.

[293] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049-1051.

after the establishment of a township. As authority for this statement, Lorentz relied on *Hollmann and Another v Estate Latre*.[294] In this case, Steyn CJ stated:

> "The proposition that the mere right to trade on another's property, even if granted to successive owners of another property, cannot qualify as a praedial servitude, is not by any means unassailable. There is authority, cited by counsel for the respondent, pointing the other way. Brunneman *Com ad Dig* 8.1.19, *Voet* 8.4.15 *in fine*, for instance, appear to be of the view that a servitude would qualify as a praedial servitude if it would raise the price of the dominant tenement, while in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1, at 16, it was apparently accepted that a servitude to trade upon a particular property could be constituted in favour of another property."[295]

The court stated that the obligation to pay over one-half of the profit should not be regarded as one *in faciendo* and that even if it is, it could still be a praedial servitude.[296] The court agreed with Lorentz to the extent that if the right to participate in the township profits attaches to land, it increased the value of that land. But the court held further that *Hollmann and Another v Estate Latre*[297] was not conclusive authority that the right in question was real,

> "though it is obviously a factor to be taken into account in determining the nature of the right."[298]

The court made it clear that the profits clause amounts to a subtraction from the *dominium*, but held that even upon registration, a real right in the form of a praedial

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[294] 1970 (3) SA 638 (A).

[295] *Hollmann and Another v Estate Latre* 1970 (3) SA 638 (A) 644.

[296] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1051H.

[297] 1970 (3) SA 638 (A) 644.

[298] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052A.

servitude had not been established.[299] It pointed out that the right (and obligation) in dispute was,

> "a personal one sounding in money and cannot be equated to the servitudes referred to."[300]

According to the court:

> "[T]he conditional obligation to pay attaches of necessity not to the land (which is not burdened) but merely to the owner thereof. His rights are curtailed but not in relation to the enjoyment of the land in the physical sense."[301]

The court conceded that the fact that the original co-owners had not only caused the notarial deeds to be registered, but for more than fifty years successors in title to the various subdivisions had apparently acted as if the township-clause was a praedial servitude, was a weighty factor. However, it held that this was a case where, "the sanctity of the register" had to yield to the need for deleting an incorrect registration of contingent personal rights.[302] Therefore, the condition regarding the establishment of the township created only personal rights, which even upon their incorrect registration were not capable of becoming and had not become, praedial servitudes.[303] Accordingly, the court ordered the removal of the rights from the deeds register.

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[299] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052A-B.

[300] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052D.

[301] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052E.

[302] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1054E-F.

[303] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1055E. See also *Hollins v Registrar of Deeds* 1904 TS 603 607; *Schwedhelm v Hauman* 1947 (1) SA 127 (E) 136; *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 436C.

The implication of this decision is that even though a personal right is erroneously registered, its registration does not convert or transform it into a real right. It appears that the court found that the burden imposed must relate to physical use of the land. At least in the context of servitudes, which was the framework here, the court's view is correct as the only servitude allowing benefit of civil fruits is usufruct, which did not apply in this case. In regard to usufruct, the once-off nature of the payment is probably very important, but it is not in the nature of other types of servitude to involve a once-off benefit. The statement by the court that the burden imposed a subtraction from the *dominium*, but was in any event not a real burden, appears contradictory and incorrect. Arguably, the court should have found that there was in fact no subtraction from the *dominium*.

Academic response to the application of the subtraction from the *dominium* test in *Lorentz* is mixed and overall unfavourable. Van der Merwe describes the judgment in *Lorentz v Melle and Others*[304] as, "a watershed in respect of the distinction between real and personal rights."[305] Sonnekus argues that in the *Lorentz* case the court did not apply the subtraction from the *dominium* test, but the insolvency test. He argues that the court, although not explicitly stating so, was guided by the primary question relating to the nature of the object of the right, which is an entitlement to claim against a person and not a right against the land.[306] Badenhorst and Coetser argue that even though the *Lorentz* case is cited as authority for the application of the subtraction from the *dominium* test, it is arguable whether there are indications that the court did not apply the test literally, but

[304] 1978 (3) SA 1044 (T).

[305] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 66.

[306] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180 179.

implicitly realised its shortcomings.[307] De Waal argues that the decision in *Lorentz* points to the unreliability of the subtraction from the *dominium* test in properly identifying a right as real. He indicates that the court acknowledged the unreliability of the test by the uncritical way in which it was applied.[308]

Van der Walt argues that the court in the *Lorentz* case emphasised the physical aspect of the Deeds Registries Act's requirement that a right should restrict the exercise of ownership in respect of land, and apparently narrowed the subtraction from the *dominium* test so as to focus on the restriction that a limited real right should place on the owner's use or enjoyment of the property in the physical sense.[309] He concludes that in view of the decision in the *Lorentz* case, it appears highly unlikely (at least in the former Orange Free State and Transvaal high courts)[310] that a condition which places an obligation on a landowner to pay a sum of money to another person could ever qualify as a real and registrable right of servitude.[311]

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[307] PJ Badenhorst & PPJ Coetser "*Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C)" (1991) 24 *De Jure* 375-389 389-380.

[308] MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 7.

[309] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 419; AJ van der Walt *The law of servitudes* (2016) 387. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 60; MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 8.

[310] Now the Free State and Gauteng high courts.

[311] AJ van der Walt *The law of servitudes* (2016) 387.

2 6 3 4 Pearly Beach Trust v Registrar of Deeds

In *Pearly Beach Trust v Registrar of Deeds*[312] the applicant sought an order declaring a condition embodied in a deed of sale of immovable property registrable in terms of section 3(1)(*r*) of the Deeds Registries Act.[313] This section provides that the registrar of deeds must register "any real right, not specifically referred to in this sub-section". The applicant argued that the condition created a limited real right.[314] The condition entitled a third party to receive from the transferee and its successor in title, one third of the consideration received in return for an option or right to prospect for minerals on the land. In addition, the condition entitled a third party to receive one third of the compensation in case of expropriation or sale of the property to the authority empowered to expropriate.[315]

The registrar of deeds refused to register the deed containing the condition on the basis that the condition did not "restrict any right of ownership in land" as required by section 63(1) of the Deeds Registries Act as it did not amount to a subtraction from *dominium*. The registrar of deeds pointed out that the condition did not oblige the owner or successor in title to grant mineral rights or to sell the land. The registrar's view was that the condition created nothing more than an obligation to pay over a share in the proceeds of a grant, sale, or expropriation to a third party. The registrar of deeds emphasised that there was no obligation on the owner to grant any rights to the land. As far as expropriation is concerned, the registrar argued that there was no limitation of rights of the owner until

[312] 1990 (4) SA 614 (C).

[313] Act 47 of 1937.

[314] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 614H.

[315] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615B-C.

expropriation, and then only a personal liability to share the compensation. The same applies to disposal of the land by way of agreement with an expropriating authority.[316]

After discussing case law on the subtraction from the *dominium* test, the court pointed that one of the rights of ownership is the *jus disponendi* or right of alienation.[317] If this right is limited, in the sense that the owner is precluded from obtaining the full fruits of the disposition, it is indicative of one of his rights of ownership having been restricted.[318] Relying on *Ex parte Geldenhuys*[319] and other cases[320] where the subtraction from the *dominium* test was applied, the court held that,

> "the test for registrability has been whether the correlative obligations is binding upon the successor in title of the person upon whom the obligation rests."[321]

The obligation was described as a,

> "charge […] which qualifies the right of an owner to enjoyment of the *jus disponendi.*"

Accordingly, the obligation was binding against not only the transferee, but also his successors in title and therefore registrable.[322] It is important to note that the court

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[316] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615F-G

[317] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 615G-618D.

[318] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 617H-I.

[319] 1926 OPD 155 164.

[320] *Commissioner for Inland Revenue v Estate Hobson* 1933 CPD 386; *NG Kerk, Aberdeen v Land & Agricultural Bank of SA* 1934 (2) PH M36; *Schwedhelm v Hauman* 1947 (1) SA 127 (E); *Ex parte Pierce and Others* 1950 (3) SA 628 (O) 635D; *Wool Products of South Africa and Another v Director of Valuations* 1950 (4) SA 490 (E) 499; *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O) 605E; *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 (4) SA 174 (E).

[321] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 618C-D.

[322] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 618E.

expressly stated that the right to receive money in this case was, "a right other than a servitude."[323]

The application of the subtraction from the *dominium* test in the *Pearly Beach Trust* case has been criticised in academic literature. Sonnekus criticises the judgment in the *Pearly Beach Trust* case[324] arguing that the court failed to apply the correct test to determine whether a particular right or condition was a real right or not. Accordingly, he supports the registrar of deeds' conclusion that the condition could not constitute a real right and that it was therefore not registrable. Nevertheless, he argues that the conclusion could have been reached without the application of the subtraction from the *dominium* test.[325] In this regard, he suggests that to determine whether the condition was a real or personal right, the court should have considered two factors.[326] First, the nature of the object of the right indicates that, if a right provides its holder with a direct entitlement to a thing, it is a real right. If the right provides its holder with the entitlement to claim from another party to carry out a certain act (performance), it is a personal right despite the fact that it is a thing being delivered. Based on this consideration, Sonnekus argues that

[323] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 617G.

[324] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180.

[325] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180 177.

[326] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180 179.

in the *Pearly Beach* case the object of the holder's right was performance by another person and not use or transfer of the land.[327]

The second consideration is the source of origin of the right. A real right is established in an original way (for example, occupation) or in a derivative way (delivery or registration in the case of immovable property), whereas a personal right arises from a contract or a delictual claim. Sonnekus argues that in the *Pearly Beach* case it was clear that the right was intended to originate in contract as opposed to upon registration. Hence, registration played no role in the establishment of the right. Registration was only significant because the contracting parties intended to enforce the rights against successors in title. Sonnekus argues that because the right to demand and receive payment is a personal right, its registration had no influence on the enforceability against third parties who were not parties to the agreement.[328] In short, he argues that it seems unlikely that the obligation to pay a sum of money will ever create a real right because it is a personal right in nature.

In his earlier publication, Van der Walt argued that if obligations could be shown to create a direct relationship between the grantee and the land itself, and not between only the grantee and the landowner in his personal capacity, there should be no reason to fear that the creation of new real rights can destroy or erode the institution of ownership.[329]

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[327] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180 179.

[328] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180 180.

[329] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 198.

Furthermore, if there is a connection between the land and an obligation to pay a certain percentage of the landowner's crops or of the proceeds of its development, the obligation could be the source of a real right. In short, the monetary obligation can be the source of real rights once it is clear that the money that must be paid comes from the land itself or its produce and fruits. Van der Walt found support for this argument in *Executors, Estate Napier v Trustee, Estate Weir*,[330] where the court stated that the annual payment, which was the object of that decision, did not necessarily have to *come out of the fruits of the property*, if any. Pointing out that a similar view was expressed in *Ex parte Pierce*,[331] Van der Walt argued that the courts' remarks could provide a useful criterion for distinguishing between obligations to pay money that can bind the land and a similar obligation that cannot.[332] Accordingly, he found it questionable whether the monetary payment in question was supposed to come from the land itself and its produce. Based on the decisions of the two cases briefly discussed above, Van der Walt concluded that the court's decision in *Pearly Beach Trust v Registrar of Deeds*[333] – that the obligation in question was real and registrable – was reasonable.[334]

[330] 1927 SR 33 44.

[331] 1950 (3) SA 628 (O) 635E, where it was stated that "an obligation to pay money imposed on the owner of land *qua* owner out of the proceeds of land may well be regarded as a diminution of the ownership and as creating real rights."

[332] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 199

[333] 1990 (4) SA 614 (C).

[334] AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 203.

In a recent publication written in honour of Professor JC Sonnekus,[335] Van der Walt appears to have changed his view regarding the decision in the *Pearly Beach* case. More specifically, the view that the once-off monetary payment could be seen as a portion of the profit derived from use or exploitation of land, and that it could therefore be recognised as a limited real right.[336] He concedes that the problem with this argument is that the only limited real right that entitles a beneficiary to receive (the whole or a portion of) the profit or civil fruits of the use of land is the personal servitude of usufruct (or, to a more limited extent, of use).[337] Moreover, the fact that the payment in the *Pearly Beach* case was a once-off payment indicates that it cannot be regarded as civil fruits of the land.[338] Van der Walt argues that the right in the *Pearly Beach* case was clearly not a usufruct. In addition, the court, in line with Sonnekus's[339] argument, explicitly stated that it was not a servitude of any kind. According to Van der Walt, such a right could only be an entirely novel category of limited real rights that shadows some features of usufruct.[340] Van der Walt

[335] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420.

[336] See AJ van der Walt "Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights" (1992) 55 *THRHR* 170-203 199.

[337] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 418. See further, AJ van der Walt *The law of servitudes* (2016) 387.

[338] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 418.

[339] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180 179-180.

[340] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 418, points out that allowing registration of such a new category of real rights that somewhat resembles, but does not quite amount to, classical category of real rights is probably exactly what the anti-fragmentation strategies seek to avoid, since it can result in layering of similar but discrete rights, in other words fragmentation.

concedes that the notion that this payment was a product of exploitation of the land was not sufficient to qualify it as a limited real right as it was clearly not a usufruct. Therefore, the decision to recognise this right as a limited real right was probably incorrect, as Sonnekus argues, because the right to demand and receive the payment was essentially a personal right.[341]

Van der Merwe also criticises the judgment in the *Pearly Beach Trust* case based on lack of authority.[342] He argues that the cases relied upon by the court (briefly discussed below) are not sufficient to warrant registration of the right embodied in the condition. *Ex parte Pierce and Others*[343] was concerned with mineral rights bequeathed by a last will to five children. Van der Merwe points out that because mineral rights are well-recognised, registrable real rights, this case does not warrant the extension as envisaged by the court. In *Commissioner for Inland Revenue v Estate Hobson*[344] an obligation on the transferee of land and his successor in title to pay an annuity to the transferor's wife, was held to be a registrable right. This case was further analysed in *Nel NO v Commissioner for Inland Revenue*,[345] but the then Appellate Division explicitly left the question whether the obligation to pay an annuity out of the proceeds of the land was registrable, open for later decision. The decision in *Barclays Western Bank Ltd v Comfy*

[341] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 418.

[342] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 66. PJ Badenhorst & PPJ Coetser "*Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C)" (1991) 24 *De Jure* 375-389 386-388 also criticise the decision for lack of authority.

[343] 1950 (3) SA 628 (O) 635D.

[344] 1933 CPD 386.

[345] 1960 (1) SA 227 (A).

Hotels Ltd[346] was handed down without a comprehensive review of relevant decisions. Van der Merwe concludes that the courts have been reluctant to recognise that a mere pecuniary obligation placed upon the owner of land can be construed (except in the well-recognised cases) as a real burden on land rather than as a personal obligation binding only upon the current owner on the land.[347]

2 6 3 5 Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others

In *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others*[348] the first appellant (Cape Explosive Works – "Capex") sold and transferred two parcels of land (a larger and a smaller parcel) to the second respondent (Armscor). The sale was subject to certain restrictions on Armscor and its successors in title.[349] The first condition restricted the use of the properties for the development and manufacture of armaments by Armscor or the government of the Republic of South Africa. The second condition gave Capex a right to repurchase the property at a price to be determined in the event of the land no longer being required for the restricted use. Armscor also undertook to inform Capex if the property was no longer needed for the development and manufacture of armaments. Subsequent to the transfer of the properties, the restrictions on the smaller parcels of land were cancelled by notarial deed of cancellation.[350] Armscor sold the large parcel of land to the first respondent (Denel). While the transfer of the larger parcel of

[346] 1980 (4) SA 174 (E).

[347] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 66.

[348] 2001 (3) SA 569 (SCA).

[349] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 573D-574E, 579C.

[350] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 574G.

land to Denel had originally taken place subject to both conditions, in a further consolidating transfer, the second condition was omitted altogether, and the first condition remained applicable only to a very small portion of the consolidated land as opposed to the entirety.[351]

A dispute arose between Capex and Denel as to whether Capex would be entitled to repurchase the erf, which formed part of the properties in the event of it no longer being required for the development and manufacture of armaments (the first condition).[352] Denel sought a declaratory order that its right of ownership in the land was not subject to the second condition. Capex, in a counter-application, sought an order directing the registrar of deeds to rectify the respective deeds to include the two conditions, and an order compelling Denel to comply with the conditions.[353]

The high court applied the twofold test to determine the registrability of the conditions. In terms of the twofold test, the court first had to determine whether it was the intention of the parties to create a real right. Secondly, whether the nature of the right was such that it would result in a subtraction from the *dominium*. The high court elected to apply the subtraction from the *dominium* test first.[354] It formulated the test as follows:

> "One compares the right in question and the correlative obligation to see whether the obligation is a burden upon the land itself or whether it is something which is to be performed by the owner personally. If it is the former, the right is capable of being a

[351] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 574G-575B.

[352] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 575D.

[353] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 575E-G.

[354] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 435E-F.

> real right. If it is the latter, it cannot be a real right. In order to ascertain whether the obligation is a burden upon the land two useful concepts which have been used are that the curtailment of the owner's rights must be something in relation to the enjoyment of the land in the physical sense […] or that the obligations 'affect the land' or 'run with the land'."[355]

The court *a quo*'s application of the test to the two conditions in question produced different results. The court acknowledged the inherent difficulties in the application of the subtraction from the *dominium* test, and noted that the decisions in the *Lorentz* and *Pearly Beach Trust* cases, "are irreconcilable." It made it clear that it preferred the narrow approach followed in the *Lorentz* case.[356] The court expressly stated that the *Pearly Beach Trust* case was wrongly decided because the rights in question imposed no more than a personal obligation on the owner of the property. In line with the *Lorentz* case, it held that there was "no restriction in the physical sense of the owner's right to deal with the property."[357] Applying the subtraction from the *dominium* test to the first condition (the restriction on the use of the land), it held that the condition was registrable in terms of section 63(1) of the Deeds Registries Act because it curtailed the right to use the land. However, the parties did not intend the condition to be binding on Armscor's successors

[355] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 435F-H.

[356] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 437E.

[357] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 437E.

in title. This was clear because the parties specifically agreed not to register it against the property.[358]

The court further held that the second condition (the first right to repurchase) does not constitute a subtraction from the *dominium* because there is nothing in it,

> "which affects the property or which curtails Armscor's right of enjoyment of the property in the physical sense."

Accordingly, the second condition on its own, and despite the agreement by the parties to record it in the title deed, was "clearly not registrable."[359] The court also considered whether the second condition was registrable in terms of the proviso to section 63(1) of the Deeds Registries Act as complementary or otherwise ancillary to a registrable condition (the first condition). It held that although the two conditions were linked to a certain extent in the deed of sale, the conditions were independent of each other and dealt with different matters. Therefore, the second condition was not ancillary to the first registrable condition.[360] Accordingly, the high court dismissed Capex's counter-application and granted an order declaring that Denel's right of ownership was not burdened by the second condition.[361]

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[358] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 437H-I.

[359] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 438A-B.

[360] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 438C-G.

[361] *Denel (Pty) Ltd v Cape Explosive Works Ltd and Another; Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 1999 (2) SA 419 (T) 439D-G. MJ de Waal "Numerus clausus and the development of new real

On appeal, the Supreme Court of Appeal had to decide whether the two conditions were registrable and what the effect of their omission from subsequent title deeds was.[362] Relying on *Erlax Properties (Pty) Ltd v Registrar of Deeds and Others*,[363] the Supreme Court of Appeal formulated the test for registrability as follows:

> "To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied: (1) the intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and (2) the nature of the right or condition must be such that the registration of it results in a 'subtraction from *dominium*' of the land against which it is registered."[364]

The court rejected Denel's contention that the second condition constituted a personal right (in the nature of an option) to repurchase which could not be converted into a real right by registration. The court's basis for rejection of Denel's contention was that, unlike an option, the second condition did not contain an offer to enter into a contract.[365] The court also rejected Denel's contention that the second condition did not constitute a valid real right because it imposed an obligation on the transferee to notify the transferor when the properties were no longer required for the use to which they had been restricted. The court pointed out that the condition was not intended to burden the transferee with an obligation. The Supreme Court of Appeal highlighted that the first condition consisted of a use restriction. While the second condition provided that in the event of the property no

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rights in South African law" (1999) 11 argues that this case is an illustration of a "case where the 'subtraction from the *dominium*' test worked well, if only because the facts were not problematic."

[362] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 572G-H, 578B-C.

[363] 1992 (1) SA 879 (A) 885B.

[364] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 578D-E.

[365] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 578F.

longer being required for the restricted use to which it was restricted, Armscor or its successors in title, would advise Capex accordingly, whereupon Capex would become entitled to repurchase the property, failing which the property would no longer be subject to the use restriction. Upon the property no longer being required for the restricted use it would be useless to the owner unless Capex repurchased it or if the use restriction could be terminated. Accordingly, the second condition was intended to provide Armscor and its successors in title with a mechanism for termination. Hence, although framed as an obligation, the giving of notice was as much a right as an obligation. The court made it clear that the use restriction in the first condition was materially different from the use restriction according to first condition read with the second condition. Moreover, the two conditions were not independent of one another and they could not be separated. They formed a composite whole and were specifically stated to be binding on the transferee and its successor in title.[366]

The court preferred to apply the intention test first, and then the subtraction from the *dominium* test. It explicitly stated that the conditions constituted a burden upon the land or a subtraction from the *dominium* of the land in that they restricted the use of the property by the owner. It held that the right embodied in the two conditions, read together, constituted a real right, which was registrable in terms of the Deeds Registries Act.[367] According to the court, a real right is protected by its registration in the deeds office. Once

[366] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 579B-D.

[367] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 579B-D.

Capex's rights were registered, they were maintainable against the whole world.[368] The court made it clear that the real right created by the two conditions was not,

> "extinguished by their erroneous omission from subsequent title deeds and the fact that Denel's title deed, registered in the deeds office, did not reflect those rights does not assist Denel."

South African law follows a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs and third parties cannot place absolute reliance thereon.[369] Consequently, the Supreme Court of Appeal held that Denel's application should have been dismissed and the condition should have been carried forward into subsequent title deeds of the respective properties.[370] It therefore granted an order interdicting Denel from acting contrary to the conditions.[371]

Badenhorst, Pienaar and Mostert argue that the Supreme Court of Appeal by not referring to curtailment in relation to the enjoyment of land in the physical sense does not appear to sanction the narrow formulation of the subtraction from the *dominium* test.[372] Moreover, the decision of the Supreme Court of Appeal is only authority for the proposition

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[368] See also *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) 582A, 583E.

[369] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 579E. See also *Knysna Hotel CC v Coetzee NO* 1998 (2) SA 743 (SCA) 753A-D; *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n Ander* 1975 (4) SA 936 (T); *Standard Bank van SA Bpk v Breitenbach en Andere* 1977 (1) SA 151 (T) 156C-E.

[370] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 580H.

[371] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 581C.

[372] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 64. See also PJ Badenhorst "Erroneous omission of real rights from subsequent title deeds – *Cape Explosive Works Ltd; AECI Ltd v Denel (Pty) Ltd; Armaments Corporation of SA Ltd and the Registrar of Deeds, Cape Town*" (2001) 22 *Obiter* 190-203 195.

that a land-use restriction coupled with a right of repurchase in the event of the property no longer being required for the restricted land use, is capable of being registered.[373]

Badenhorst indicates that the decision is not authority for the proposition that a right of repurchase or pre-emption is capable of registration. Discrepancies regarding the registrability of options, rights of pre-emption, and other rights relating to the entitlement to deal with property remain.[374] He argues that the court failed to classify the second condition clearly. Accordingly, he assumes that a right of repurchase and a right of pre-emption are of the same nature. He is of the view that the court's failure to identify the second condition in more clearly is important for two reasons. Firstly, the court failed to resolve the conflicting case law regarding the registrability of options and rights of pre-emption. The former rights are not registrable, whereas the later rights are.[375] He argues that the court's failure to identify the nature of the second condition can be attributed to its application of a "composite-condition approach."[376]

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[373] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 64.

[374] PJ Badenhorst "Erroneous omission of real rights from subsequent title deeds – *Cape Explosive Works Ltd; AECI Ltd v Denel (Pty) Ltd; Armaments Corporation of SA Ltd and the Registrar of Deeds, Cape Town*" (2001) 22 *Obiter* 190-203 195.

[375] PJ Badenhorst "Erroneous omission of real rights from subsequent title deeds – *Cape Explosive Works Ltd; AECI Ltd v Denel (Pty) Ltd; Armaments Corporation of SA Ltd and the Registrar of Deeds, Cape Town*" (2001) 22 *Obiter* 190-203 196-197.

[376] See *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 579B-C, where it was stated "[t]he use restriction according to condition 1 was materially different from the use restriction according to condition 1 read with condition 2. The two conditions were not independent of one another and they could not be separated. They formed a composite whole. They were specifically stated to be binding on the transferee, being Armscor, and its successors in title."

Badenhorst argues that a sounder reason could have been advanced for rejecting Denel's contention that the second condition could not constitute a valid real right as it imposed an obligation on the transferee to notify the transferor when the properties were no longer required for the use to which they have been restricted. He supports the court's rejection of the application of the rule applied in *Schwedhelm v Hauman,*[377] but for a different reason. The court's basis for rejection of the application of the *Schwedhelm v Hauman* rule was that the condition, "was not intended to burden the transferee with an obligation."[378] He argues that the rule relied upon in *Schwedhelm v Hauman* was not applicable to the second condition because it is not a servitude but a right of purchase. He indicates that if one accepts the court's composite-condition approach and reads it together with the court's reference to the reservation of a right on the terms set out in the two conditions,[379] "the composite whole (probably) constituted a servitude which makes the rule in *Schwedhelm v Hauman* relevant."[380]

Van der Walt points out that at first glance, it appears as if the decision of the Supreme Court of Appeal in the *Capex* case brought greater clarity to the extent that the court generally subscribed to the approach followed in the *Lorentz* case – thus requiring the condition to diminish the owner's *physical use of the land* before it could be registered.

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[377] In *Schwedhelm v Hauman* 1947 (1) SA (E) the court applied the Roman law rule that, with the exception of the servitudes *oneris ferendi* and *altius tollendi*, a servitude cannot cast upon the owner of the servient tenement an obligation actively to do something.

[378] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 578H.

[379] *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) 580G.

[380] PJ Badenhorst "Erroneous omission of real rights from subsequent title deeds – *Cape Explosive Works Ltd; AECI Ltd v Denel (Pty) Ltd; Armaments Corporation of SA Ltd and the Registrar of Deeds, Cape Town*" (2001) 22 *Obiter* 190-203 197.

However, argues Van der Walt, on its facts the *Denel* decision dealt with exactly the situation referred to in *Lorentz*, namely a condition that in fact places a restriction on the landowner's use and enjoyment in the physical sense, and not with payment of a sum of money.[381] The decision, therefore, does not address the sum of money issue at all and does not bring any greater clarity on the conflicting decisions on that point. It thus remains unclear whether an obligation to pay a sum of money could be registered as a servitude, even in situations where it is clear that the money is the product of the use or exploitation of the land. Based on the general authority that the *Lorentz* decision seems to have enjoyed in subsequent case law – despite its being the decision of a provincial division – it appears safe to assume that such a condition will probably not be registered as a servitude.[382]

2 6 3 6 Bondev Midrand (Pty) Ltd v Puling (802/2016); Bondev Midrand (Pty) Ltd v Ramokgopa (803/2016)

In *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016),[383] the Supreme Court of Appeal once again had to deal with the question of the nature of rights registered in the deeds registries. The appellant, Bondev, a property developer, unsuccessfully sought an order obliging the respondents (Ramokgopa and Puling) to re-transfer pieces of land which they had earlier purchased from the appellant. The basis for the claim was that the respondents had failed to comply with a condition registered against title deeds obliging them to erect buildings on the property within a

[381] AJ van der Walt *The law of servitudes* (2016) 387.

[382] AJ van der Walt *The law of servitudes* (2016) 388.

[383] [2017] ZASCA 141 (2 October 2017).

prescribed period. The Gauteng high court in Pretoria dismissed the developer's claim on the basis that it was seeking to enforce a debt as envisaged in section 11(*d*) of the Prescription Act 68 of 1969, which had prescribed and became unenforceable as more than three years had elapsed after it had become due. The Supreme Court of Appeal granted leave to appeal.[384]

The respondents contended that the claim for re-transfer constitutes a debt for the purposes of the Prescription Act 68 of 1969, but not one envisaged in sub-sections 11(*a*), (*b*) or (*c*) of that Act. They therefore submitted that, in terms of section 11(*d*) of the Act, the prescriptive period was three years. In contrast, the developer (appellant) argued that the registered condition gave rise to a real right (and not merely a personal right). Accordingly, it did not prescribe within three years.[385]

Leach JA explained that the condition in question consisted of two clauses. The condition, as cited by the court, provided that:

> "The Transferee or his Successors in Title will be liable to erect a dwelling on the property within 18 (eighteen) months . . . . failing which the (appellant) will be entitled, but not obliged to claim that the property is transferred to the (appellant) at the cost of the Transferee against payment by the Transferee of the original purchase price, interest free. The Transferee shall not within the said period so transfer the property

[384] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 1.

[385] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) paras 3-5.

> without the (appellant's) written consent. This period can be extended at the discretion of the (appellant)."[386]

The first clause obliged the transferee or its successors in title to erect a dwelling on the property within a period of eighteen months. The second clause provided that in the event of a dwelling not being erected within that period, the appellant was entitled but not obliged to have the property retransferred to it against return of the purchase price.[387] As the first clause reflected an intention to bind not only the transferee, but also its successors in title, Leach JA found that it resulted in an encumbrance upon the exercise of the owner's rights of ownership of its land and therefore gave rise to a real right.[388] On the other hand, the right of the appellant to claim re-transfer of the property against repayment of the original purchase price, as set out in the second clause, did not amount to such an encumbrance. According to the Supreme Court of Appeal, this right could only be enforced by a specific person (the appellant) against a determined individual, and does not bind third parties. Indeed, this is the hallmark of a personal right, which the appellant could exercise at its sole discretion. On its own, the second clause would not have carved out a portion of the respondents' ownership and would therefore remain a personal

[386] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 2.

[387] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 12.

[388] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 13. The court relied on the authority of *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) paras 16, 20 and the authorities cited there.

right.[389] Leach JA emphasised that although only real rights and not personal rights may be registered against a title deed – as prescribed by section 63(1) of the Deeds Registries Act – the fact that a personal right is registered does not convert it into a real right.[390]

Leach JA then dealt with the appellant's contention – which was based on *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd & Others*[391] – that although the second clause appeared to create a personal right, it was inextricably connected with the first clause, which clearly created a real right. Furthermore, the argument goes, the two clauses must be read together as creating a real right capable of registration.[392] Leach JA explained that Denel's right under the second condition, to give notice to the transferor (Capex) that the property was no longer being used for the specified purpose, provided a mechanism for terminating the restriction on the rights of ownership. Consequently, either Capex would repurchase the property or, if Capex was not inclined to do so, Denel would retain its ownership free of the restriction. The encumbrance of the land created by the first condition could only continue until Denel gave Capex notice under the second

[389] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 14.

[390] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 15. As authority for this view, the court cited *British South Africa Company v Bulawayo Municipality* 1919 AD 84 93; *Fine Wool Products of Extensions Africa Ltd v Director of Valuations* 1950 (4) SA 490 (E) 499B-C, *Nel, NO Commissioner for Inland Revenue* 1960 (1) SA 227 (A) 34H-35A, *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & Others* 1974 (4) SA 362 (T) 367H; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049.

[391] 2001 (3) SA 569 (SCA).

[392] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) paras 15-17.

condition. Therefore, the restriction on ownership in the first condition was inseparably bound-up with that in the second condition.[393]

By contrast, Leach JA found that the burden created by the first clause in the *Bondev* case, namely the obligation to build a dwelling on the property, was binding on the transferees (the respondents) and their successors in title. The respondents had no right under the second clause to terminate the restriction. The second clause only provided that in the event of a failure to build a dwelling in the requisite time, the appellant, as the transferor, could recover the land against the payment of the purchase price if that was its choice. This was akin to providing the appellant with an option to purchase which, on the authority of *Barnhoorn NO v Duvenhage & Others,*[394] essentially constitutes a personal right. However, the appellant was not obliged to demand or claim re-transfer of the land. Therefore, the obligation to build would remain extant as long as the respondents retained their ownership; the restriction on ownership created by the first clause remained binding and would not be terminated should the appellant elect not to seek re-transfer. The court held that the two clauses read together, therefore, did not constitute what Streicher JA referred to in the *Capex* case as "a composite whole" restricting the respondents' use of the property.[395] Therefore, the second clause under which the appellant had the election to claim re-transfer of the property, created no more than a

[393] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 18.

[394] 1964 (2) SA 486 (A) 494F-H.

[395] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 19.

personal right akin to an option to purchase which was not inseparably bound up with the first clause.[396]

In conclusion, Leach JA dealt with whether the debt which was the subject of the claim in terms of the second clause, had prescribed. He found that it was settled that even on a narrow meaning, a debt included the right to claim the return of property. The court held that in light of the conclusion that the second clause indeed created no more than a personal right; the appellant's claims in both cases had been correctly dismissed by the court a *quo* based on prescription.[397]

2 6 4 Critical assessment

To determine registrability of rights in the deeds registry, South African courts have over the years developed and applied the twofold registrability test. This test seek to make the distinction between limited real rights and personal rights more intelligible or less problematic. In terms of the test, if the consensually created right or condition limits or subtracts from the landowner's *dominium*, and the parties (or party) intended to bind successors in title, it is a real and thus registrable.

Predominantly, the courts' approach is to first apply the intention test and then the subtraction from the *dominium* test. Analysis of the intention test indicates that the intention of the parties or party plays an equally important role as that of the subtraction from the *dominium* test in deciding whether a condition in a contract or bequest in a will

[396] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) para 20.

[397] *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017) paras 21-22.

could create a limited real right or personal right. Thus, if the right passes the subtraction from the *dominium* test, and the parties intended to create right binding successors in title, the right is real and registrable. However, the intention of the parties (in an agreement) or a testator (in a will) cannot transform or convert the nature of a right if such a right does not subtract from the owner's *dominium.* The same applies to the subtraction of the *dominium* test; even if the condition subtracts from the *dominium* but the intention of the parties or a party was to bind only a specific person and not the land, the corresponding right is personal in nature.

Strictly speaking, the intention of the parties (a party) to create a real or personal right should be gleaned from the terms of the contract or deed of transfer. If it is not clear from the contract or deed of transfer or a bequest of a right in a will, the assumption should be against the creation of a real right. The *onus* is upon the person affirming the existence of a real right to prove it.[398] Overall, the intention test appears less problematic, in fact, relatively straightforward.

An evaluation of the subtraction of the *dominium* test shows that the courts have been applying it since the early 1890s. However, the test was first clearly formulated in *Ex parte Geldenhuys*,[399] and has since been applied with reference to that decision. It appears that the difficulty in the application of the subtraction of the *dominium* test generally arises in cases where parties to an agreement or a testator impose an obligation

[398] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* 2015 (5) SA 304 (SCA) 310F-311A; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1050F; *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A) 406; *Edelor (Pty) Ltd v Champagne Castle Hotel (Pty) Ltd and Another* 1972 (3) SA 684 (N) 689-690; *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16.

[399] 1926 OPD 155 164.

to pay a once-off sum of money to the landowner and successors in title. The question is whether such a condition to pay a once-off sum of money subtracts from the owner's *dominium* and so creates a limited real right or a personal right. In *Ex parte Geldenhuys,*[400] it was held that the obligation could not constitute a limited real right (a servitude) upon registration because it binds the legatees in their personal capacity. However, because of the close connection between the two obligations, the court allowed its registration together with a registrable condition regarding the time and manner in which the subdivision of the land had to occur.[401] The court made it clear that the co-registration was permitted purely for practical purposes. Therefore, such registration did not transform or convert the condition regarding payment of money into a real right.[402]

In the *Lorentz* case the court held that the condition, which entitled the other party to claim one-half of the nett profits in the event of the development of township on either of the subdivided properties, and the sale of portions thereof, subtracted from the owner's *dominium*.[403] However, the court held that even upon registration, a real right in the form of praedial servitude had not been not established as the burden imposed by the condition did not limit the owner and successor in title's use of the land in a *physical sense*.[404] The court, therefore, ordered the removal of the rights from the register. Hence, the implication of this decision is that even though a right is erroneously registered, its registration does not convert or transform such a personal right to a limited real right.

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[400] 1926 OPD 155 164.

[401] *Ex parte Geldenhuys* 1926 OPD 155 165-66.

[402] *Ex parte Geldenhuys* 1926 OPD 155 165.

[403] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052A-B.

[404] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1052A-B.

In the *Pearly Beach Trust* case the court explicitly stated that the obligation to pay a once-off sum of money was *a right other than a servitude* which may be registered because it limits the landowner's right of alienation, and was thus a subtraction from the *dominium*. Clearly, the decision in the *Pearly Beach Trust* case is in conflict with the decisions in *Ex parte Geldenhuys* and the *Lorentz* case. All three cases were decided in different high courts – the old Free State court, the old Transvaal court, and the old Cape court.[405] The Supreme Court of Appeal decisions in *Capex, Willow Waters Homeowners Association,* and *Bondev Midrand* bring no greater clarity to the conflicting decisions on the sum of money issue. The decision in the *Capex* case does not address the sum-of-money issue at all, while the *Willow Waters Homeowners Association* and *Bondev Midrand* decisions merely confirm that a limited real right can be created to ensure payment of a debt in the form of a real security right, and not that a servitude can be created to accomplish this. Therefore, the question of whether or not a condition in a contract or a will that obliges a party to pay a once-off sum of money could qualify as a limited real right, at least in case law, remains answered.

Academic views regarding the above question are mixed and generally unfavorable. In view of the majority of academic view, it appears unlikely that the obligation to pay a once-off sum of money will ever constitute a servitude – in nature it remains a personal right.[406] If it is recognised as a limited real right as held in the *Pearly*

[405] See also AJ van der Walt & S Maass "The enforceability of tenants' rights (part 1)" 2012 *TSAR* 35-52 43.

[406] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180 180; AJ van der Walt *The law of servitudes* (2016) 387; AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 418. See further, CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 66.

Beach case – "a right other than a servitude"[407] – it can only be seen as an entirely novel category of limited real right.[408] In light of the discussion of conflicting case law with regard to the application of the twofold test for registrability (subtraction from the *dominium* test and intention test), and academic views,[409] it is clear that the twofold test is not entirely reliable.

2 7 Conclusion

This chapter set out with several objectives. The first was to provide the historical overview of origins and development of the distinction between personal and real rights in Roman law and Roman-Dutch law with a view to determining its impact, if any, in modern South African law. It is clear from the chapter that the origins and development of the distinction is complex and contentious.[410] Some Romanists insist that the distinction developed in the fourteenth century. But the prevailing view is that the Postglossators, and French, Dutch, and German Romanists construed the distinction between real and personal rights in the sixteenth, seventeenth and eighteenth centuries. This

[407] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 617G.

[408] AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 418.

[409] JC Sonnekus "Saaklike regte of vorderingsregte? – Tradisionele toetse en 'n *petitio principii*" 1991 *TSAR* 173-180 179; PJ Badenhorst & PPJ Coetser "*Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C)" (1991) 24 *De Jure* 375-389 385; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 115; MJ de Waal "Numerus clausus and the development of new real rights in South African law" (1999) 7; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 87; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 66; AJ van der Walt "Novel servitudes" in EC Schlemmer (ed) *Liber Amicorum: Essays in Honour of JC Sonnekus* 2017 *TSAR* 408-420 418.

[410] See section 2 2 above.

notwithstanding, it emerged that although the theoretical concepts underpinning the distinction between real and personal rights were further developed, they already existed in a nascent form in the writings of some of the Glossators. The seventeenth century Roman-Dutch law has had a strong influence on modern South African law, and in particular, the distinction and classification by Hugo Grotius. In terms of Grotius's theory, the principal characteristic of a real right is its enforceability against the property without reference to any person ("*erga omnes*"), whereas a personal right can only be exercised with reference to a specific person who is bound to the claimant by way of his or her duty to perform, possibly in relation to a thing. Arguably, Grotius's theory is typified in the form of the classical theory, as well as in the wording of section 63(1) of the Deeds Registries Act.

Secondly, the chapter aimed to examine the function of this distinction in property law and its implications for the doctrine of notice. It became clear that it is important to distinguish between limited real rights and personal rights as each category of right is regulated by a different branch of the law. The law of property governs real rights, while the law of obligations governs personal rights. Furthermore, to determine a suitable remedy for a right, it is vital to establish the extent to which and against whom, the right is enforceable.

Third, the chapter aimed to describe and analyse the distinction between personal rights and limited real rights in land in current South African law, and to gauge whether or not the fact that South African property law does not formally adhere to the *numerus clausus* principle, exacerbates the conundrum surrounding the distinction. This entailed scrutinising the *numerus clausus* principle, European civil codes, South African legislation

dealing with registration formalities, case law, and academic literature addressing the distinction. It emerged from this investigation that the *numerus clausus* principle emerged at the end of the eighteenth century as a revolutionary reaction against the multiple-ownership rights embodied in feudal land relationships. Most civilian legal systems, consequently, formally adhere to the *numerus clausus* principle, and have incorporated a closed list of real rights in their civil codes. The effect of strict adherence to the *numerus clausus* principle is that parties to a contract, or the testator in a will, could only constitute real rights enumerated in the civil code. Therefore, the custom in civilian legal system is that only the legislator can modify or create a new type of limited real right and not parties in an agreement or a testator in a will. This means that party autonomy in the law of property is limited in the interests of legal certainty and predictability.

The South African position is interesting because the property law system does not formally adhere to the *numerus clausus* principle. It is therefore in principle possible to create new types of limited real right in land. Over the years, several new types of limited real right in land outside the traditionally recognised categories has developed, but in the main through legislation. Strictly speaking, difficulties arise when it has to be determined whether a consensually created right or condition that does not fit any of the traditionally recognised categories of limited real right such as servitudes, mortgage and long-term leases, is a real right. An examination of case law indicates that the tendency in the courts was to apply, strictly, the common-law requirement relating to specification of the nature and content of a limited real right. Seemingly, the result is that the creation of a new type of limited real right in land is influenced, to some extent, by the nature and content of the analogous limited real right – largely in the law of servitude and real security

law – which provides the basis for its recognition. This shows the courts' conservative approach to the consensual creation of new types of limited real right beyond the traditionally recognised categories. Viewed from a different perspective, this implies that party autonomy to create new types of limited real right is curtailed more than one would, at a first glance, assume in light of the presumption that non-adherence to the *numerus clausus* principle extends contractual and testamentary freedom in property law.

It is arguable that the fact that South African property law does not formally adhere to the *numerus clausus* principle, does not necessarily open the door to the unchecked creation of new types of limited real right in land by parties to a contract or a testator in a will. To prevent fragmentation of landownership by an unchecked proliferation of limited real rights in land, South African law uses strategies that either proscribe the recognition of consensual rights as limited real rights, or make it difficult to create new categories of limited real rights in land through mandatory rules. These mandatory rules predetermine how consensual limited real rights in land maybe created, transferred, and terminated and what their content may be. At the forefront of the defence mechanism against fragmentation of landownership are legislative measures that prescribe formalities and requirements for the creation and transfer of real rights in land. This legislation takes the form of the Deeds Registries Act – which proscribes registration of personal rights and rights that do not qualify as rights in land because they do not "restrict the exercise of any right of ownership in respect of immovable property"[411] – and the Alienation of Land Act,[412]

[411] See s 63(1) of the Deeds Registries Act 47 of 1937. S 3(1) of the Act 47 of 1937 imposes a duty on the Registrar to register specific categories as well as any real right not specifically mentioned in ss(1).

[412] 68 of 1981.

which prescribes that transfer of real rights in land should be in writing. To supplement these legislative measures, South African academic literature has over the years formulated different doctrinal approaches aimed at making the distinction between personal and limited real rights in land more intelligible. The main doctrinal approaches are the classical theory and the personalist theory. Neither of these doctrinal approaches is decisive or unequivocal in drawing the distinction, but both can provide some assistance in individual cases. Moreover, South African courts have developed a twofold test which is used as an *a priori* criterion to determine whether a right is real and, therefore, registrable in the deeds registry. The first test, the intention test, focuses on whether parties to a contract or a testator in a will, intended to create either a limited real right or a personal right in land. In practice, the intention test is seldom problematic. The second test, the subtraction from the *dominium* test, focuses on whether the condition or obligation in question restricts the exercise of any right of ownership. Analysis of case law and academic literature concerning the application this test, shows that it is not wholly reliable. However, the courts' application of the subtraction from the *dominium* test in rather difficult cases indicates a judicial reluctance to recognise novel types of limited real right.

My contention is that viewed as a whole the registration and legislation prescribing formalities for registration, the doctrinal approaches developed in academic writing, and courts' strict application of common-law principles describing the specification, nature, and characteristics of limited real rights, makes it difficult to consensually create novel types of limited real right in land. Therefore, these anti-fragmentation strategies perform a similar function to that of the *numerus clausus* principle.

In conclusion, it is arguable that party autonomy in South African property law is permitted provided that the limited real right, which the parties to an agreement or the testator in a will intend to create, fits into one of traditionally-recognised limited real rights such as servitude, mortgage,[413] and long-term lease. It appears that the creation of novel types of limited real right outside of these recognised categories could, at most, be created through legislation rather than consensually. In view of the discussion of case law in this chapter, it is quite clear that for any right or condition to be registrable in the deeds registry, its nature must be such that, upon registration, it subtract from the owner's *dominium* (possibly in a *physical sense*) and must have been intended to bind successors in title. That is to say, even if parties (or a party) intended to bind successors in title but in its nature a condition or right does not subtract from the owner's *dominium*, its registration will not transform it into a real right. What is more, it is clear from the analysis of case law dealing with whether a condition in a contract or will which obliges a person to pay a single sum of money, could qualify as a limited real right other than a personal servitude (usufruct and use) and praedial servitude, remains a point of disagreement. This might lead one to endorse, *prima facie*, the view that neither registration, statutory formalities, academic literature, nor case law provides a satisfactory solution to the conundrum surrounding the distinction between limited real rights and personal rights in land.

[413] Note that the Insolvency Act 32 of 1916 regulates real security rights created by consensus. Therefore, any new type of real security right over immovable property that parties may create will not have preferent over the rights regulated by the Insolvency Act. It is therefore not surprising that R Brits *Real security law* (2016) 390 argues that there is *numerus clausus* of real security right as per the preferences in the Insolvency Act 32 of 1916.

Strictly speaking, the general principle in South African property law is that any consensually-created, unregistered right (potential real right) is not binding on successors in title – save for the doctrine of notice. This is because registration of the right plays a dual role: it creates or transfers the right; and also satisfies the publicity principle. The doctrine of notice provides that if the acquirer of a real right in land had knowledge of the existence of a prior personal right which was capable of establishing a competing real right upon registration, the acquirer must give way for the registration of a prior personal right. Doctrinally, the purpose of the doctrine of notice is not to create a real right, but to compel the subsequent acquirer of a real right to cooperate in registration or refrain from doing anything that may obstruct the holder of a prior personal right to acquire a real right through registration in the deeds registry. This is in line with the derivative acquisition of real rights two-stage approach where the real agreement is a requirement (entailing intention to acquire and transfer) for acquisition of real rights by registration.

Chapter 3

Basic characteristics and scope of application of the doctrine of notice

3 1 Introduction

In the first part of this chapter, I explain the basic characteristics of the doctrine of notice and why it is regarded as an anomaly in both the law of property and the law of contract and is sometimes perceived also to involve the law of delict. I then describe what kind of notice (kennis) is required on the part of the third-party acquirer for the doctrine to operate. Then I discuss the controversy over whether the doctrine should not operate to transform all personal rights (also personal rights of a purely personal nature) into rights with a real effect, or whether the doctrine should transform only personal rights *ad rem acquirendam* into rights with a real effect. Put differently, should the doctrine come to the aid of all personal rights or only to personal rights with the aim of being transformed into a real right upon transfer or registration? The final part of the chapter is devoted to the scope of the doctrine of notice, namely the various scenarios in which the doctrine operates. These include instances of double and successive sales; sales in conflict with options, rights of pre-emption or a duty not to sell land without a certain party's prior approval; sales in conflict with security rights; instances where servitudes, or long-term leases have been agreed upon but not registered; and arguably also instances where there has been a sale in execution of property conflicting with a previously acquired personal right.

3 2 The doctrine of notice

The basic principle of South African property law is that a real right prevails over a personal right when they come into competition with one another, even if the personal right was prior in time.[1] For example, if A sells a property to B and subsequently sells the same property to C, ownership is acquired by the purchaser who first obtains transfer of the property sold. However, the strict divide between contract and property law embodied in the fundamental distinction between personal and real rights, is tempered by the doctrine of notice.[2] The doctrine of notice provides that if the acquirer of a real right in land had knowledge of the existence of a prior personal right that would establish a competing real right upon registration, the acquirer must give way so that the prior personal right can be registered.[3] Therefore, if C purchases from A with knowledge of the

[1] *Hassam v Shaboodien* 1996 (2) SA 720 (C) 724H-I. See further FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ De Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21; RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180.

[2] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 248. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21.

[3] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 24B; *De Villiers v Potgieter NO* 2007 (2) SA 311 (SCA) 9. See further AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 228; H Mostert & A Pope (eds) *The principles of the law of property in South Africa* (2010) 58; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 247. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 83 state that the doctrine of notice applies to personal rights in general.

prior sale concluded between A and B, B is entitled to claim that the transfer to C be set aside and that transfer of the property be effected from A to B.[4]

Since the early 1880s, the doctrine of notice has been the subject of debate in the South African case law and literature. During this time academics, especially McKerron,[5] Mulligan,[6] and Scholtens,[7] debated the issue in terms of Roman-Dutch sources and the relevant issues of principle and rationality.[8] The difficulty that these academics experienced in explaining and justifying the doctrine of notice is also apparent in recent literature, particularly regarding its basis and classification within the general conceptual framework of the South African private law.[9] Hence, attempts to classify the doctrine of

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[4] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21. See also D Carey Miller "A centenary offering: The double sale dilemma – time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 247.

[5] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182.

[6] GA Mulligan "Double sales and frustrated options" (1948) 65 *SALJ* 564-577; GA Mulligan "Double sales: A rejoinder" (1953) 70 *SALJ* 299-307; GA Mulligan "Double, double toil and trouble" (1954) 71 *SALJ* 169-169.

[7] JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34; JE Scholtens "Difficiles nugae - once again double sales" (1954) 71 *SALJ* 71-86.

[8] See also D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98.

[9] In this regard see FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36; D Carey Miller "A centenary offering: The double sale dilemma – time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 258.

notice within the general conceptual framework of private law seek to place it in either the law of obligations or the law of property. On the one hand, there are authors who argue that there is no need for an independent doctrine of notice as the doctrine should be explained on the basis of the principles of the law of delict.[10] On the other hand, other authors argue that a negligent infringement of a personal right does not constitute an actionable wrong in South African law.[11] The uncertainty with regard to the classification of the doctrine is intensified by considerable ambiguity regarding aspects of its application.

The doctrine of notice is regarded as anomalous to the basic principles of South African law for two reasons. First, it permits the holder of a prior personal right to prevail over a subsequently acquired real right. Second, it requires the transferee with notice to give effect to the contractual undertakings of his or her predecessor in respect of the property:[12]

> "From the perspective of property law, this seems to accord a personal right an immunity against divesting upon a change of ownership, which is regarded as the hallmark of a real right. From another point of view, the notion that an outsider may be bound to give effect to an undertaking of another to which he has not consented,

[10] NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 170. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32.

[11] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 53.

[12] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 249.

> flies in the face of the strict notion of contractual privity adhered to by the South African law of contractual obligations."[13]

Zimmerman asserts that the doctrine of notice is a doctrinal anomaly because a position which, conceptually, is purely obligatory is turned into a real right.[14] Brand contends that we simply have to accept that the doctrine of notice is a doctrinal anomaly that does not fit neatly into the principles of either the law of delict or the law of property.[15] However, McKerron argues that absence of privity is not a sufficient reason to reject the doctrine of notice, which is purely equitable and runs counter to the strict rule that a real right takes precedence over a merely personal right.[16] In *Bowring NO v Vrededorp Properties CC*,[17] Brand JA, with reference to McKerron,[18] held that the notion that B can be allowed to claim performance against C of a contractual undertaking by A is clearly an anomaly in that it flies in the face of contractual privity. However, Brand JA emphasised that this

[13] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 249. See further FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30; D Carey Miller "A centenary offering: The double sale dilemma – time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98; R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 237; RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180.

[14] R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil Law and common law in South Africa* (1996) 217-260 237.

[15] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30. See further *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 19.

[16] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180.

[17] 2007 (5) SA 391 (SCA) 15.

[18] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180.

anomaly could not constitute a bar to affording B the right to claim transfer of the property sold, directly from C.[19]

3 3 The notice required for the operation of the doctrine of notice

South African case law holds different views as to the type of notice required on the part of the third-party acquirer for the doctrine of notice to operate. In this regard, the Afrikaans translation of the doctrine "*kennisleer"* seems more appropriate, because notice is taken of the kind of *knowledge* of the personal right the third party had.

In *Ridler v Gartner*[20] the plaintiff requested rectification of the title deeds of the property held be himself and the defendant and he requested that an allusion to a "water furrow 'J'" be altered to "water furrow 'H3'" on the ground of the misdescription in the deeds office of a servitude of aquaeductus in favour of his portion of the farm. It appeared that the plaintiff and defendant owned adjoining properties of the same farm. The previous owner who sold one portion to Ridler, the present purchaser, and the other portion, which now belong to the defendant, to Saner, subdivided these two portions, which were originally one, in 1913. Saner afterwards sold to Goodman, and Goodman sold to the defendant. When the previous owner sold the portions of the farm to the plaintiff and to Saner, they constituted, on Saner's portion, in favour of Ridler, a servitude of aqueductus giving the exclusive right to the water flowing in a certain furrow to Ridler. The only right that the servient tenement, owned by Saner, had, was the right of the water for domestic purposes and for watering cattle. The previous owner of the farm was the owner of the

[19] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 16.

[20] 1920 TPD 249.

furrow and they meant to convey a servitude of aquaeductus to Ridler and to burden the portion they sold to Saner with the servitude. Unfortunately, the furrow was misdescribed as “furrow ‘J’” instead of “furrow H 3”. With the intention to sell the farm, Goodman placed a somewhat misleading advertisement in the Farmer’s Weekly that there was on the farm a strong stream of water and 15 acres under irrigation. The defendant, a civil engineer and land surveyor by profession, went into the question of the titles of the properties before he purchased the portion of the farm. He investigated the matter further himself and found that in the title deeds of the plaintiff and Goodman, the servitude was described as giving the exclusive right of furrow ”J” to the plaintiff. Eventually it turned out that Schocher who prepared the deeds of transfer to the plaintiff and Saner was entirely mistaken; that the furrow “J” had disappeared and that the water that the owner of the farm meant to transfer to the plaintiff was the water in “H 3”. However, the mistake was still reflected in the deeds office.[21]

The court considered the kind of knowledge required from the defendant to order rectification of the title deeds of the properties held by himself and the defendant by having the allusion to a “water furrow ‘J’” altered to “water furrow ‘H3’”.

Wessels J stated:

> “There must be an element of deceit, an element of chicanery in the transaction, before the court will set it aside on the ground of knowledge. It must be perfectly clear to the court that the person who alleges that he bought clean transfer knew perfectly well and did not expect that he would get a clean transfer except by his fraud. Any

[21] *Ridler v Gartner* 1920 TPD 249 251-252 and 261-263.

> other view of the law would be extremely dangerous and would dig away the very foundation upon which our whole system of registration is based"[22]

and again

> "But *prima facie* the knowledge must exist at the date of the purchase, and it is for the person who challenges a clean transfer to show that knowledge at a later date ought to be taken into consideration. In the present case there is nothing whatsoever which would justify me in taking into consideration knowledge acquired after the date of the purchase. It is not as though the defendant had knowledge of the property; it is not as though he had any suspicion as to what the true state of affairs was. He went there, as far as I can see, perfectly ignorant of the true state of affairs and being a man who relied upon his own technical knowledge he thought that from the plans he could obtain all the information that was necessary….He saw from the plan what the furrows were, and he thought that his knowledge was greater than that of any other person concerned with the matter. The mistake was entirely due to the fact that Schocher [*the person who had prepared the necessary transfer deeds]* drew the bow at a venture and called "H 3" the furrow "J" when in fact he knew nothing about it."[23]

The court therefore found in favour of the defendant as the latter did not have the knowledge required for having the property burdened by a servitude.[24] From the above it becomes clear that the doctrine of notice does not only apply in cases where the second purchaser or grantee had actual knowledge of the previous unregistered servitude but also in the case where the second purchaser had the knowledge of certain facts that cause doubt whether he would obtain a clean transfer without the burden of a servitude of *aquaeductus* on the farm being transferred to him. In the present case, the plaintiff in investigating the matter relied on the information of the deeds registry and concluded that

[22] *Ridler v Gartner* 1920 TPD 249 259-260.

[23] *Ridler v Gartner* 1920 TPD 249 260-261 (my Italics).

[24] *Ridler v Gartner* 1920 TPD 249 261 and 265.

there was nothing suspicious to prevent him from acquiring a clean transfer of the property; he saw no yellow lights flashing. Wessels J was probably formulating something akin to *dolus eventualis* without expressly identifying it as such.

Grant and Another v Stonestreet and Others[25] concerned an application by riparian owners of a public stream for an order declaring that an unregistered servitude relating to the use of the waters of that stream was binding upon a fellow riparian owner (Grant). The court found that the onus lay throughout upon the applicants to establish that the respondent had that degree of knowledge of the unregistered servitude that would render it legally binding upon him notwithstanding the absence of registration.[26] Because *mala fides* was not easily presumed, clear proof of knowledge on his part was required before the court would hold a purchaser bound by an unregistered servitude. However, if a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have that actual knowledge.

Ogilvie Thompson JA stated the following:

> "The vital question remains: was the extent of Grant's knowledge of the servitude, at the time he acquired Navarre and as established in the evidence, sufficient in law to render him bound by the unregistered servitude claimed by the applicants? Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will – subject to a possible qualification,… relating to cases where there has been intervention of a prior innocent purchaser – be bound by it notwithstanding the absence of registration. The

[25] 1968 (4) SA 1 (A).

[26] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 16H-17A.

> basis of this obligation is that in attempting, under such circumstance, to repudiate the servitude, the purchaser is *mala fide*, and that the law refuses to countenance any such attempted repudiation because, as it is put in some cases, it is reality amounts to a species of fraud. Mala fides is not readily presumed and …. clear proof of knowledge on his part ifs required before the Court will hold a purchaser bound by an unregistered servitude."[27]

Ogilvie Thompson JA then quoted the following statement of Wessels J in *Ridler v Gartner*:[28]

> "There must be an element of deceit, an element of chicanery in the transaction before the Court will set it aside on the ground of knowledge. It must be perfectly clear to the court that the person who alleges that he bought a clean transfer knew perfectly well and did not expect that he would get a clean transfer except by fraud. Any other view of the law would be extremely dangerous and would dig away the very foundation upon which our whole system of registration is based."[29]

Ogilvie Thompson JA then rounded off that the cumulative effect of the kind of knowledge required for the application of the doctrine of notice is the following:

> "Although, unlike the English Law, the doctrine of constructive knowledge has, in our law, little or no application in enquiries of this kind (*Erasmus v Du Toit* 1910 TPD 1037*, Snyman v Mugglestone* 1935 CPD 565), the statement made by Bristowe, J in *Erasmus v Du Toit* 1910 TPD 1049 that if a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice, appears to me to be sound in principle and to merit the approval of this Court."

[27] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20A-D.

[28] 1920 TPD 259-260.

[29] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20D-E.

In the present case the court concluded that the cumulative effect of the various considerations mentioned was to establish in accordance with the standard of proof required in civil cases, that Grant, when he acquired Navarre, had a sufficient knowledge of the existing servitude as to render him legally bound thereby, unless a special defence raised by him relieved him of that obligation.[30] The special defence was that the appellants (Grant and his predecessor in title) could not, in any event, be held by the servitude in the absence of proof that each and everyone of their predecessors-in-title had knowledge of the servitude when they acquired the servitude.[31] On this defence, Ogilvie Thompson responded with the following pronouncement:

> "If a series of innocent purchasers be postulated, anomalies may no doubt present themselves: but in my view, such considerations should not, without more, be permitted to enable the subsequent purchaser with knowledge always to avoid all consequences of the knowledge. As shown above, the principle whereby the purchaser is held bound by the servitude is that, in the circumstances of the case, the repudiation thereof is mala fide, notwithstanding the absence of registration."[32]

The importance of this case is that it followed *Ridler v Gartner* in deciding that not only actual knowledge is required for the doctrine of notice to operate but that something akin to *dolus eventualis* on the part of the second acquirer would constitute sufficient knowledge.

In *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*,[33] Van Heerden AJA for the first time identified that the kind of knowledge

[30] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 22A.

[31] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 22E.

[32] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 23D.

[33] 1982 (3) SA 893 (A).

required is either actual knowledge of the previous unregistered right or knowledge that amounts to *dolus eventualis*, namely that the purchaser saw yellow lights flashing and nonetheless continued with the transaction. In this case, Van Heerden AJA held that the only requirement for the operation of the doctrine is actual knowledge (or perhaps *dolus eventualis*) on the part of the acquirer with regard to the prior personal right. Once this requirement is met, the holder of the personal right is afforded what is in effect a limited real right against the acquirer.[34] Although Van Heerden AJA did not refer to *Grant v Stonestreet and Others*[35] as authority for his reference to *dolus eventualis*, his judgment echoes what was said by Ogilvie Thompson JA in *Grant v Stonestreet and Others*[36] namely that:

> "[A]lthough, unlike the English Law, the doctrine of constructive knowledge has, in our law, little or no application in enquiries of this kind (*Erasmus v Du Toit* 1910 TPD 1037*, Snyman v Mugglestone* 1935 CPD 565), the statement made by Bristowe, J in *Erasmus v Du Toit* 1910 TPD 1049 that if a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice, appears to me to be sound in principle and to merit the approval of this Court."

In *Meridian Bay Restaurant v Mitchell*,[37] Ponnan JA confirmed that the only requirement for the operation of the doctrine of notice is,

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[34] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250 contends that the statement by Van Heerden JA in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd* 1982 (3) SA 893 (A) 910 that the doctrine of notice results in personal rights being accorded a limited real effect seems to exacerbate, rather than resolve, the dogmatic puzzle.

[35] 1968 (4) SA 1 (A).

[36] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20E-F.

[37] (686/09) [2011] ZASCA 30 (23 March 2011).

> "actual knowledge (or perhaps *dolus eventualis*) of the prior personal right of the first purchaser on the part of the second purchaser (the acquirer)."[38]

The court held that, *dolus eventualis* would be present if the second purchaser foresaw the possibility of the existence of the first purchaser's personal right, but proceeded with the acquisition of his real right regardless of the consequences as regard the first purchaser's prior personal right.[39] Brand argues that in the context of the doctrine of notice, *dolus eventualis* would mean that although the acquirer of the real right did not have actual knowledge of the prior personal right, he subjectively foresaw the possibility of the existence of such a right but proceeded with the acquisition regardless of the consequences to the prior personal right.[40]

At which point of time must the second purchaser or second grantee have had knowledge of the first sale or the unregistered servitude? In Grant *and Another v Stonestreet and Others*, it was accepted that the knowledge of the prior right need not have existed at the moment when the second purchaser entered into the contract with the seller, but could exist at any time before transfer or registration in the name of the second or subsequent purchaser takes place. This is best illustrated by knowledge on the part of successive purchasers for instance where the second purchaser did not have any

[38] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 27.

[39] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 18. For a recent case law where the court confirmed that the only requirement for the doctrine of notice is actual knowledge or perhaps *dolus eventualis* see *Anthony and Another v Japies and Others* (17614/2016) [2017] ZAWCHC 92 (12 September 2017).

[40] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 26.

knowledge of the prior personal right of the first purchaser, but the third successive purchaser had knowledge of the prior personal right *ad rem adquirendam* of the first purchaser.[41]

3 4 Does the doctrine protect all personal rights or only personal rights ad rem acquirendam?

3 4 1 General

Generally, the doctrine of notice operates to protect personal rights aimed at the acquisition of real rights (*iura in personam ad rem acquirendam*) and not to protect purely personal rights.[42] This protection is against third parties who intend to prevent the prior personal right from being registered or to invalidate rights which have been registered in the name of the third party acquirer. This has been the position since the early 1880s.[43] However, certain case law appears to have extended the application of the doctrine to all personal rights, including those that will not become real rights upon registration. In this sense the doctrine of notice raises fundamental questions: On what basis is the holder of a prior purely personal right protected against a subsequent acquirer of a real right? What kinds of personal rights are protected by the doctrine of notice?

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[41] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 24B-C. D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 109.

[42] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) SA 784 (T) 797C.

[43] For example, see *Cohen v Shires, McHattie and King* (1881-1884) 1 SAR TS 41 47; *Richards v Nash and Another* (1881) 1 SC 321; *Judd v Fourie* (1881) 2 EDC 41 52; *Jansen v Fincham* (1892) 9 SC 289; *Pienaar v Van Zyl* (1899) 16 SC 260.

3 4 2 Case law supporting the view that the doctrine protects only personal rights aimed at the acquisition of real rights

In a decision of the then Appellate Division in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd,*[44] the defendants claimed that in 1900 they had acquired the sole, exclusive, and perpetual right to establish and lease trading sites and to trade on the land concerned. They further asserted that the plaintiff company was aware of their claim claim when the land was purchased, and that the defendants enjoyed the same rights on the land as existed under the previous owner. The court held that:

> "In order that notice of the existence of prior rights should affect a purchaser of land held under unencumbered title, it is necessary that the rights should be real, so that their delivery would take away something from the *dominium* which he is seeking to acquire."[45]

In another decision handed down by the then Appellate Division, *De Jager v Sisana*,[46] Sisana occupied a portion of a farm under an agreement with the former owner (Van der Westhuizen) in which he undertook to render services to the Van der Westhuizen in exchange for the right of occupation. The farm was sold and transferred to the appellant (De Jager), who was aware of the agreement between his predecessor in title and the respondent (Sisana). De Jager was willing to allow Sisana to continue in occupation in return for services rendered to him in place of the former owner. However, Sisana refused

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[44] 1913 AD 267.

[45] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280. In *Steytlerville DRC v Bosman* (1893) 10 SC 67 70 it was held that, although an agreement between the applicants and the respondent's predecessor that prohibits sale of liquor in the property created personal rights only, it would affect successors in title who acquire with express notice of the prohibition.

[46] 1930 AD 71.

to recognise De Jager as the new owner of the farm and stated that he would only render services to the former owner, although he claimed the right to remain on the farm.[47]

De Jager sought an order to evict Sisana as he refused to render services to him as the new owner. It was common cause that the agreement was not a lease agreement, even though in some respects it was analogous to a lease agreement. Hence, Sisana did not have, or could not acquire, a personal right to acquire a real right (a *ius in personam ad rem acquirendam*) under the agreement with the former owner. Nevertheless, he contended that the appellant bought the farm with knowledge of the agreement and was, therefore, bound by the agreement in terms of the doctrine of notice. De Villiers CJ reasoned that the case law relied on by Sisana did not apply as in this case Sisana had no real right, or at least a right *in personam* to acquire a real right. The judge stated that there may be some force in the contention that the doctrine of notice should be extended to this case.[48] Nevertheless, the court granted the appellant an order to eject Sisana from the farm because even if a purchaser with knowledge of such an agreement could be bound by its terms, Sisana had lost any rights he might have had against the purchaser by refusing to render the services. Consequently, the court upheld the appeal.

In yet another decision of the then Appellate Division dealing with an unregistered servitude, *Grant and Another v Stonestreet and Others*,[49] Ogilvie-Thompson JA stated:

> "A servitude, once it is registered, is said to have a *pro tanto* 'carved out' portion of the *dominium* of the servient tenement. It is with reference to rights of this nature, which upon registration would so affect the *dominium*, that the rule holding bound a

[47] *De Jager v Sisana* 1930 AD 71 75-77.

[48] *De Jager v Sisana* 1930 AD 71 74.

[49] 1968 (4) SA 1 (A).

> purchaser with knowledge of the existence of an unregistered servitude has its true application."[50]

In *Low Water Properties (Pty) Ltd v Wahloo Sand CC*,[51] the applicants alleged that the respondent had refused to comply with certain terms of a servitude. In turn, the respondent argued that there was no obligation on it to comply with the positive obligations imposed upon the original grantor in terms of the notarial deed. The following positive obligations were imposed on the owner of the servient tenement: to extract water from the borehole; to supply the borehole; to supply the pump for extracting the water from the borehole; to ensure that the supply of water was at all times sufficient for domestic use by the recipients; and to maintain the pipeline and repair it if damaged.[52] Liebenberg J stated that,

> "[i]t is apparent from these decisions that the doctrine of notice is not applicable to personal rights and the correlative obligations of the kind we are presently concerned with."[53]

In *Bowring NO v Vrededorp Properties CC*[54] the court compared the right that a purchaser acquires from a contract of sale, with the right of a beneficiary under a servitude agreement and held that,

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[50] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 24A-B.

[51] 1999 (1) SA 655 (SE).

[52] *Low Water Properties (Pty) Ltd v Wahloo Sand CC* 1999 (1) SA 655 (SE) 659G-H.

[53] *Low Water Properties (Pty) Ltd v Wahloo Sand CC* 1999 (1) SA 655 (SE) 663C. In support, the court cited *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1058H-1059F and *Vansa Vanadium SA Ltd v Registrar of Deeds and Other* 1997(2) SA 784(t) 796I-797H.

[54] 2007 (5) SA 391 (SCA).

> "[b]oth rights are so-called *iura in personam ad rem acquirendam*, ie personal rights to acquire a real right."[55]

These decisions applied the doctrine of notice solely to prior personal rights that would establish a competing real right upon registration. Van der Walt and Maass are of a view that the doctrine of notice should only protect a prior personal right to acquire a real right, and not pure personal rights.[56]

3 4 3 Case law supporting the view that the doctrine operates in favour of rights purely personal in nature

However, since 1893 the doctrine of notice has been applied to cases where the subsequent acquirer of land was aware of purely personal. Thus, in *Steytlerville DRC v Bosman*[57] it was held that, although an agreement between the applicants and the respondent's predecessor prohibiting the sale of liquor in the property created personal rights only, it would affect successors in title who acquire the property with express notice of the prohibition.

The application of the doctrine has since been extended to the purely personal right of pre-emption (also referred to as the right of first refusal),[58] as well as to an option

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[55] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 17. See also AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 230.

[56] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 23.

[57] (1893) 10 SC 67 70.

[58] *McGregor v Jordaan and Another* 1921 CPD 301. See further AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 89.

to purchase land.[59] In *Vansa Vanadium SA Ltd v Registrar of Deeds*,[60] the court held that the right to prospect *per se* does not create real rights and that essentially none of the provisions of the prospecting contract in question gave rise to real rights.[61] Regarding the doctrine of notice, the court stated that the doctrine applies in principle only to rights *in personam ad rem acquirendam*, but that earlier decisions had extended its application to a right of pre-emption and an option to purchase land – ie, to purely personal rights.[62] According to the court, the reason for this extension was that both these contracts relate to the purchase of land, which is a right *in personam ad rem acquirendam*.[63] This is incorrect. A perusal of the reasons advanced in the two cases shows that the courts in fact decided that similar ethical considerations (fraud) apply in the case of knowledge of rights of pre-emption and in options to purchase that apply in the case of knowledge of a previous sale.

The court in *Vansa Vanadium SA Ltd v Registrar of Deeds* then concluded:

> "Generally speaking, knowledge of rights and obligations of a personal character only casts no obligation on a purchaser of property or the acquirer of a real right there into recognise such rights nor does it render his conduct fraudulent in refusing to do so…

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[59] *Le Roux v Odendaal and Others* 1954 (4) SA 432 (N). In *Spearhead Property Holdings Ltd v E and D Motors (Pty) Ltd* 2009 (4) All SA 417 (SCA) 53 the court held that if a purchaser had notice of the existence of the option prior to purchasing, he must be taken to have bought the property subject to the lessee's personal right against the landlord to exercise it. AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229 argue that the extent of the application of the doctrine of notice to purely personal rights is not clear from the decision.

[60] 1997 (2) SA 784 (T).

[61] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) SA 784 (T) 794E-I & 795J-796D.

[62] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) SA 784 (T) 797E-F.

[63] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) SA 784 (T) 797E-F. See also AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229.

> …This also negates the argument that commercial morality requires that the applicant should recognise the rights of the second respondent. In this latter respect it should also be borne in mind that the second respondent chose to acquire purely personal rights as opposed to an option to purchase the mineral rights in the Winnaarshoek properties and thereby avoided the large capital outlay which the latter option would render."[64]

Cussons v Kroon[65] dealt with a partnership asset which was sold to a purchaser who had knowledge of the partnership and of the fact that the asset could not be sold without the consent of the other partner. The court referred to *Vansa Vanadium SA Ltd v Registrar of Deeds*,[66] and held that there was no reason why the doctrine of notice could not apply where a person has a right that property may not be sold without her prior approval.[67] The basis for the court's decision was that there is no difference between an option to purchase land, and the right that property may not be sold without a certain person's prior approval.[68] Streicher JA was at pains to emphasise that the operation of the doctrine of notice does not depend on the protected right being a personal right *ad rem acquirendam*: knowledge on the part of the purchaser of a mere personal right is sufficient.[69]

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[64] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) SA 784 (T) 797H-I.

[65] *Cussons v Kroon* 2002 (1) All SA 361 (A).

[66] 1997 (2) SA 784 (T).

[67] *Cussons v Kroon* 2002 (1) All SA 361 (A) para 13. See further AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229.

[68] *Cussons v Kroon* 2002 (1) All SA 361 (A) 13.

[69] *Cussons v Kroon* 2002 (1) All SA 361 (A) 11. The theoretical basis for the doctrine was said to be that the purchaser who acquires with knowledge infringes the prior personal right and in so doing acts wrongfully (para 12). AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229 argue that "[i]t is not clear whether the Supreme Court of Appeal extended the application of the doctrine to purely personal rights in general or only to the specific personal right in question, namely the right that

Furthermore, in *De Villiers v Potgieter NO*[70] the appellant argued that he had a personal right to obtain transfer of immovable property because he had a personal right in all the issued shares of a private company which claimed ownership of the immovable property.[71] The court assumed, without deciding, that the share agreement still existed and that the doctrine of notice applied to the case.[72]

More interesting is the recent decision by the Supreme Court of Appeal in *Spearhead Property Holdings Ltd v E and D Motors (Pty) Ltd*,[73] where the court held that,

> "[i]f the purchaser had notice of the existence of the option prior to purchasing, he must be taken to have bought the property subject to the lessee's personal right against the landlord to exercise it."[74]

South African academic writers are divided on this matter. Badenhorst, Pienaar, and Mostert argue that the doctrine of notice applies to personal rights in general.[75] Their view

property may not be sold without the person's prior approval." However, see MJC Bobbert "Kennisleer word bevestig" (2002) 27 *TRW* 117-122 121.

[70] 2007 (2) SA 311 (SCA).

[71] *De Villiers v Potgieter NO* 2007 (2) SA 311 (SCA) 1-8. The court referred to *Cussons v Kroon* 2002 (1) All SA 361 (A), and held that in terms of the doctrine, a personal right may prevail against a succeeding real right if the acquirer of the real right had prior knowledge of the personal right. The court also referred to GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 246.

[72] *De Villiers v Potgieter NO* 2007 (2) SA 311 (SCA) 11. See also AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229-230.

[73] 2009 (4) All SA 417 (SCA).

[74] 2009 (4) All SA 417 (SCA) para 53.

[75] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 83.

is supported by Bobbert who argues that in *Cussons* the Supreme Court of Appeal should have gone further by declaring the doctrine of notice applicable to all personal rights.[76]

Van der Walt and Maass are not in favour of extending the doctrine of notice to all prior personal rights that would not establish a competing real right upon registration.[77] They argue that it is not clear whether the court in the *Cussons* and *Spearhead* cases extended the application of the doctrine to purely personal rights in general, or only to the specific personal rights in question. If the doctrine of notice is extended to all personal rights, it would give personal rights the enforceability status of real rights as third parties (with knowledge) would have to adhere to these rights simply because they were aware of them. This would be inconsistent with the fundamental principles that distinguish between real and personal rights.[78] Brand shares their view.[79] It is therefore not clear whether the doctrine of notice applies only to personal rights to acquire a real right, or to all personal rights, including those that even upon registration will not become real rights.

[76] MCJ Bobbert "Kennisleer word bevestig" (2002) 27 *TRW* 117-122 120.

[77] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229-231.

[78] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229-231.

[79] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 35.

3 5 Scope and application of the doctrine of notice

3 3 1 Introduction

The doctrine of notice has been applied in a number of instances including: double sales;[80] unregistered servitudes;[81] sales in conflict with an option, rights of pre-emption or a duty not to sell land without a party's prior approval;[82] and a sale in conflict with a right of security.[83] The doctrine of notice has also been applied in cases where servitudes or long-term leases have been contracted for, but the servitude[84] or long-term lease has not been registered.[85] In certain South African cases, it has been decided that in a sale

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[80] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 894D-E; *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA)*; Cussons v Kroon* 2002 (1) All SA 361 (A) 13. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 84-85.

[81] *Richards v Nash and Another* (1881) 1 SC 312; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A); *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA).

[82] *McGregor v Jordaan* 1921 CPD 301 309; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910E-G; *Cussons v Kroon* 2002 (1) All SA 361 (A).

[83] *Coaton v Alexandra* (1879) 9 Buch 17 19; *Meyer v Botha and Hergenroder* (1882) 1 SAR 47 49-50; *Ross v Ross & Co* 1917 CPD 303 308-309; *Cato v Alion and Helps* 1922 NPD 469 471; *Thienhaus v Metje & Ziegler Ltd* 1965 (3) SA 25 (A) 25 (A) 43D-E. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 84; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 247.

[84] *Richards v Nash and Another* (1881) 1 SC 321; *Judd v Fourie* (1881) 2 EDC 41 52; *Jansen v Fincham* (1892) 9 SC 289; *Pienaar v Van Zyl* (1899) 16 SC 260; *Ridler v Gartner* 1920 TPD 249 259-260; *Manganese Corporation Ltd v South African Ltd* 1964 (2) SA 185 (W) 192H*; Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20A-C; *Kessoopersadh v Essop* 1970 (1) SA 265 (A) 277H-278C; *Dhayanundh v Narain* 1983 (1) SA 565 (N) 571F-G 573C-D; *Bezuidenhout v Nel* 1987 (4) SA 422 (N) 428H-429C; *Hassam v Shabodien* 1996 (2) SA 720 (C) 725F-G. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 84; DL Carey Miller *The acquisition and protection of ownership* (1986) 198-200.

[85] *Lawrence v Bonniwell & Veale* (1897) 7 CTR 118; *Executor of Hite v Jones* (1902) 19 SC 235; *Canavan & Rivas v New Transvaal Gold Farms* 1904 TS 136; *De Jager v Sisana* 1930 AD 84; *Hitzeroth v Brooks*

in execution, the doctrine of notice has the effect of giving a real effect to a previously existing personal right.[86] The following part of this chapter will be devoted to a discussion of the various instances in which the doctrine of notice operates.

3 3 2 Double sales or successive sales

Of all the manifestations of the doctrine of notice, the double sale or successive sale scenario is the most familiar. The usual operation of the doctrine of notice in a double-sale situation, as explained in our case law[87] and academic literature,[88] is essentially as follows: If A sells a property to B on condition that ownership will pass to B upon the payment of the full purchase price, and subsequently sells the same property to C, ownership of the property is acquired not by the first purchaser (B), but by the purchaser who first obtains transfer of the property sold (possibly C). If the first purchaser (B) is also

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1964 (4) SA 443 (E) 447; *Kessoopersadh v Essop* 1970 (1) SA 265 (A); *Total SA v Xypteras* 1970 (1) SA 592 (T). See also AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 230; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 84; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 247.

[86] *Reynders v Rand Bank Bpk* 1978 (2) SA 630; *Hassam v Shaboodien* 1996 (2) SA 720 (C). Contra, *Dream Supreme Properties 11CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) paras 24, 26.

[87] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 47; *McGregor v Jordaan* 1921 CPD 301 308; *Le Roux v Odendaal and Others* 1954 (4) SA 432 (N); *Tschirpig v Kohrs* 1959 (3) SA 287 (N) 289; *Tiger Eye Investments (Pty) Ltd v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C) 358F-G; *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T) 894B-D; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd* 1982 (3) SA 893 (A) 894D-E; *Cussons v Kroon* 2001 (4) SA 833 (SCA) 839C-E; *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 11.

[88] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 119; FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 85.

the first transferee, his or her right is unassailable. If the second purchaser (C) is the first transferee, his or her right of ownership is equally unassailable if he or she purchased the property without knowledge of the prior sale to B. However, if C purchased with knowledge of the prior sale to B, the doctrine of notice is usually deemed to entitle B to claim that the transfer to C be set aside, and that transfer be effected from A to B.[89]

The application of the doctrine of notice in the event of double sales is illustrated clearly by the decision in one of the earliest reported cases, *Cohen v Shires, McHattie and King*.[90] Shires (seller) sold two farms (property) to Cohen (first purchaser) subject to the condition that ownership would only pass after the purchase price had been paid in full. However, before the first purchaser could pay the balance of the purchase price, the same property was sold and transferred to McHattie and King (second purchasers).[91] As soon as the first purchaser became aware of the second sale, he informed the second purchasers of the first sale. He also offered to pay the balance of the purchase price to the second purchasers. However, the latter turned down the offer and refused to transfer the property to the first purchaser.[92]

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[89] *Cohen v Shires, McHattie and King* (1882) 1 SAR 47. See further *McGregor v Jordaan* 1921 CPD 301 308; *Le Roux v Odendaal and others* 1954 (4) SA 432 (N); *Tschirpig v Kohrs* 1959 (3) SA 287 (N) 289; *Tiger Eye Investments (Pty) Ltd v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C); *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T); *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 894D-E; *Cussons v Kroon* 2002 (1) All SA 361 (A) 13; *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 11. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 85.

[90] (1881-1884) 1 SAR TS 41.

[91] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 42.

[92] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 42.

The first purchaser argued that the seller had, in breach of the first sale and *mala fide,* sold and transferred the property to second purchasers, while the second purchasers has *mala fide* bought and accepted transfer of the property with knowledge of the first sale.[93] The first purchaser claimed that transfer of the property to the second purchasers should be set aside and the seller be ordered to transfer the property to the first purchaser.[94] The court rejected the second purchasers' exceptions. These exceptions were, first, that the first purchaser's summons was vague and insufficient as it failed to state the dates of sales and the name of one of the second purchasers. Second, the summons did not provide the name of the first purchaser's agent; and third, the first purchaser's summons did not pray for alternative relief in the form of damages for breach of the contract of sale.[95]

The judgment focused on the second purchasers' fourth exception relating to the recognition of the first purchaser's claim for specific performance of a contract of sale in South African contract law. On this issue, the court decided that Roman-Dutch law, and therefore South African law, recognised the right to specific performance of a contract. [96] In addition, the second purchasers argued that because the property had already been registered in their names, the seller was not in a position to transfer the property to the first purchaser. Therefore, they argued, the first purchaser should sue the seller for breach of contract.[97]

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[93] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 42, 46.

[94] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 46-47.

[95] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 44.

[96] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 45.

[97] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 46.

Applying the doctrine of notice, the court held that the second sale and transfer of the property to the second purchasers who had knowledge of the first purchaser's prior personal right to acquire the same property, was *mala fide* and therefore fraud on the first purchaser.[98] Moreover, the second purchasers could not protect themselves against the first purchaser's claim by arguing that the property had already been registered in their names, nor could the seller defend himself on the ground that he was no longer in position to transfer the property to the first purchaser.[99] Accordingly, the court granted an order setting aside the transfer to the second purchasers and directing the seller to transfer the property to the first purchaser against payment of the balance of the purchase price to the seller.[100]

In *McGregor v Jordaan*,[101] Kotzé JP (as he then was) remarked that:

> "It is a clear rule of our law that, where a vendor sells a thing to A, and then subsequently sells the same thing to B, and gives him delivery or transfer thereof, B having knowledge of the previous sale to A, the latter is entitled to claim a cancellation of the delivery or transfer to B, upon the ground that the vendor and the second purchaser with notice are considered to have acted in fraud of the rights of the first purchaser."

In *Harley v Upward Spiral 1196 CC & Others*,[102] the fourth respondent (seller) sold land to the applicant (first purchaser) subject to the condition that ownership would only pass

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[98] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 46-47.

[99] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 46-47.

[100] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41 47.

[101] 1921 CPD 301 308.

[102] 2006 (4) SA 597 (D). See also D Carey Miller "A centenary offering: The double sale dilemma – time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98 100.

after full payment of purchase price. Upon payment of the final instalment, the first purchaser requested the seller to transfer the land but the seller refused to do so. Accordingly, the first purchaser instituted an action for specific performance of the contract.[103] During the proceedings for the application for specific performance, an agreement was reached to the effect that the case would be adjourned *sine die*, and the seller would not transfer the disputed land pending the outcome of the application.[104] Nevertheless the seller went ahead and sold and transferred the land to a third party.[105] The first purchaser launched an urgent application in a form of a rule *nisi* seeking re-transfer of the land from the second purchaser to the seller. Furthermore, he requested an order interdicting the seller and the second purchaser from encumbering, disposing of, or alienating the property or portions thereof. In addition, the first purchase sought an order prohibiting the continuation of any construction work or effecting any improvements on the property. In case of non-compliance with the re-transfer order, the first purchaser sought an order authorising the Sheriff of the High Court to sign all documents required and to take all steps necessary to effect the transfer of the property.[106]

In response, the second purchaser argued, first, that the first purchaser had not made out a *prima facie* case for interdictory relief. Second, the agreement of sale between the seller and the first purchaser had lapsed due to non-fulfilment of a suspensive condition by the first purchaser. Furthermore, the second purchaser denied knowledge of an undertaking by the seller not to transfer the property, but admitted knowledge of a

[103] *Harley v Upward Spiral 1196 CC & Others* 2006 (4) SA 597 (D) 2.

[104] *Harley v Upward Spiral 1196 CC & Others* 2006 (4) SA 597 (D) 4.

[105] *Harley v Upward Spiral 1196 CC & Others* 2006 (4) SA 597 (D) 5.

[106] *Harley v Upward Spiral 1196 CC & Others* 2006 (4) SA 597 (D) 1.

pending case between the first purchaser and the seller regarding the disputed property.[107]

The court pointed out that the second purchaser's lack-of-*mala fides* defence was misplaced as such contention had been rejected by the Appellate Division in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*.[108] The court held that the applicant had proved *prima facie* that the second purchaser had knowledge of the first purchaser's prior right when the transfer was registered.[109] Furthermore, the clause claimed to be a suspensive condition was an unconditional clause.[110] Accordingly, the court granted an order in the form of a rule *nisi* directing re-transfer of the property from the second purchaser to the seller and interdicting the second purchaser and seller from, *inter alia,* selling the property. In case of non-compliance with the order, the court granted an order authorising the Sheriff of the High Court to sign all documents required and to take all necessary steps in order to effect re-transfer of the property.[111]

In practice, a prior purchaser should claim that the transfer of the property to a subsequent purchaser (with knowledge of the first sale) be set aside and the subsequent purchaser be ordered to transfer the property back to the seller who should then transfer it to a prior purchaser. Accordingly, a prior purchaser must join the seller and subsequent purchaser(s) or intermediate parties as co-respondents in an application for re-transfer of

[107] *Harley v Upward Spiral 1196 CC & Others* 2006 (4) SA 597 (D) 7.

[108] 1982 (3) SA 893 (A).

[109] *Harley v Upward Spiral 1196 CC & Others* 2006 (4) SA 597 (D) 22.

[110] *Harley v Upward Spiral 1196 CC & Others* 2006 (4) SA 597 (D) 26-29.

[111] *Harley v Upward Spiral 1196 CC & Others* 2006 (4) SA 597 (D) 31.

disputed property.[112] Nevertheless, there is a long-held academic view that in certain situations the prior purchaser should be permitted to claim transfer of the property directly from a subsequent acquirer – ie, without joining the seller and intermediate parties in an application proceedings.[113] McKerron justifies this principle as follows:

> "It remains to consider the position where transfer has been passed to the second purchaser. If *C*, when he bought, had knowledge of the prior sale to *B*, there is no doubt as to the position. The authorities, both ancient and modern, are agreed that in such a case *C* is not entitled to retain the land as against *B*. The old authorities allow *B* to recover the *res vendita* direct from *C* by a personal action *in factum,* and there is no reason why in a suitable case *B* should not be allowed to adopt this course in the modern law. But in South Africa the usual practice is for *B* to join *A* as co-defendant, and claim as against him an order cancelling the transfer, and as against *C* an order to pass transfer into his (*B*'s) name."[114]

Scholtens argues that the holder of a prior personal right may recover the property directly from the subsequent acquirer who accepted the transfer with knowledge of the existence of a prior personal right.[115] Brand asserts that on occasion the first purchaser may even

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[112] *Cohen v Shires, McHattie and King* (1882) 1 SAR TS 41. See also RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180.

[113] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180. See further PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop Law Review* 119-128 119; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 214; FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 247; JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34 34.

[114] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180.

[115] JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34 34.

be permitted to short-circuit the process by claiming transfer directly from the second purchaser.[116]

Before the Supreme Court of Appeal's decision in *Bowring NO v Vrededorp Properties CC*,[117] there was no authority in case law regarding whether a prior purchaser could claim transfer of the property directly from a subsequent purchaser.[118] The case concerned application of the doctrine of notice in both double-sale situations and in cases of unregistered servitudes. Vrededorp Properties CC (first purchaser) bought two immovable properties from Stand 160 Selby (Pty) Ltd (seller). The properties consisted of Erf 358 Selby and an undivided portion of what has become known as the railway siding. The deed of sale obliged the seller to subdivide the railway siding and transfer the portion that lies on the east side of Erf 358 Selby (blue portion) to the first purchaser, with the reservation of a right to establish a servitude of way over the remaining portion (green portion) of the railway siding.[119] Pursuant to an amendment of the deed of sale, Erf 358 Selby was transferred to the first purchaser. However, the blue portion was to be transferred to the first purchaser upon payment of the balance of purchase price.[120] Unfortunately, the subdivision and transfer of the blue portion was overtaken by the seller's liquidation. The liquidator subsequently sold the whole railway siding to Investec

[116] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21.

[117] 2007 (5) SA 391 (SCA).

[118] In *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 14, Brand JA stated "there appears to be no decided case in our law where the first purchaser's claim for transfer or delivery has been allowed directly against the second purchaser."

[119] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 3.

[120] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 5.

Bank Limited (second purchaser). The latter further sold and transferred the railway siding to Bowring (third purchasers). At all relevant times, the second and third purchasers had knowledge of the first purchaser's rights.[121]

Relying on the doctrine of notice, the first purchaser claimed the subdivision of the railway siding and transfer of the blue portion to it.[122] The third purchasers did not dispute knowledge of the first sale, but raised a twofold defence against the way in which the claim had been brought. First, they argued that the application of the doctrine of notice in double sales situations did not allow the first purchaser to claim the transfer of the property directly from subsequent purchasers. The doctrine of notice only entitles the first purchaser to set aside the transfer to subsequent purchasers, which then provides the means for the first purchaser to claim transfer from the seller. Conversely, allowing the first purchaser to claim directly from the subsequent acquirers would be against the principle of contractual privity.[123]

Admitting the absence of authority in case law where a prior purchaser had been permitted to claim re-transfer directly from a subsequent purchaser,[124] the Supreme Court of Appeal nevertheless held that in some cases a prior purchaser should be allowed to claim the transfer of the property directly from a subsequent acquirer.[125] The SCA found

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[121] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 5-6.

[122] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 11.

[123] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 13.

[124] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 14.

[125] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 15. The court relied on RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180 who argues that there is no underlying reason of principle why the first purchaser should not be allowed to claim directly from the subsequent purchaser. The court further referred to JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34 34; GF Lubbe "A doctrine

that the notion that a prior purchaser is not permitted to claim performance against the subsequent purchaser of a contractual undertaking by the seller was clearly an anomaly in that it flew in the face of contractual privity. However, such an anomaly should not constitute a bar to affording the first purchaser a right to claim transfer of the property directly from the subsequent purchaser.[126] The court stated:

> "The essential quality of the right that the purchaser acquires from a contract of sale is therefore no different from the right of the beneficiary under a servitude agreement. Both rights are so-called *iura in personam ad rem acquirendam*, ie personal rights to acquire a real right […]. In the case of a servitude, application of the doctrine of notice does not require that the transfer of the property to the purchaser be set aside so as to enable the beneficiary under the servitude agreement first to claim registration of the servitude against the seller before the property is retransferred to the purchaser subject to a registered servitude. The beneficiary's claim is allowed directly against the purchaser […]. That there is no privity of contract between the beneficiary and the purchaser is not seen as an insurmountable hurdle. Why then, it may in my view rightfully be asked, should the position be any different when the same doctrine is applied in the instance of double sales?"[127]

The court made it clear that the above statement does not mean that the first purchaser can always be allowed to claim directly from the subsequent purchaser. According to the court, if the entire property is sold to the first purchaser and then to the second purchaser,

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in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 247.

[126] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 15. The court cited RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180, who argues that "Absence of privity is not a sufficient reason for refusing to allow a remedy founded upon a doctrine such as the doctrine of "purchaser with notice," which is a purely equitable doctrine running counter to the rule of the strict law that a real right takes preference over a merely personal right."

[127] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 17.

the most equitable solution would probably be to restore the seller and the second purchaser to their former positions. This can be done by ordering cancellation of the transfer and repayment of the purchase price. Then the seller can be ordered to transfer the property to the first purchaser.[128] The position in *Bowring NO v Vrededorp Properties CC* was substantially different because the first purchaser only claimed transfer of the blue portion of the railway siding. Cancellation of the successive transfers of the entire property to the second and third purchasers, would therefore require that the remainder of the property be re-transferred first to the second purchaser and then to the third purchasers, after the blue portion had been separated and transferred to the first purchaser. Brand JA could not find any reason, "why this cumbersome and wasteful process would be in anybody's interest." Consequently, the court held that the third purchasers' first defence could not be sustained.[129] The court also rejected the third purchasers' second contention regarding non-joinder of the seller and second purchaser[130] because the third purchasers had failed to show how the order sought by the first purchaser could prejudicially affect the legal interests of the intermediate sellers (the liquidator and Investec Bank Limited).[131] Accordingly, the court ordered the third purchasers to transfer the blue portion to the first purchaser, against payment of the balance of purchase price to the liquidator of the original seller.

[128] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 18.

[129] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 18.

[130] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 12.

[131] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 22-23.

In *Meridian Bay Restaurant v Mitchell*,[132] Wimbledon Lodge (Pty) Ltd, a registered owner of a unit in a sectional title scheme, caused a *curator ad litem* to be appointed to represent the interest of the body corporate.[133] On behalf of the body corporate, the *curator ad litem* alleged that Scharringhuisen (developer) had perpetrated fraud on Wimbledon Lodge (Pty) Ltd and other owners of the units (first purchasers) in the sectional title scheme. The developer had secretly appropriated a large part of common property in the sectional title scheme for the benefit of two corporate entities that he controlled. It was unfortunate that the developer's estate had since been sequestrated and the two corporate entities that he controlled wound up.[134] Subsequently, the liquidators of the developer's insolvent estate and the corporate entities sold and transferred three of the new sections to Meridian Bay, and one to another company, which later transferred its section to Meridian Bay. Meridian Bay and other subsequent purchasers bought the units with knowledge that the titles of the sections were in dispute.[135]

The *curator ad litem* sought an order that the disputed sections in the sectional title scheme revert to the body corporate as common property and, consequently, that the sectional title plan registered in the deeds registry be rectified.[136] The basis of the *curator ad litem*'s case was that the developer altered the sectional plans that had been annexed

[132] (686/09) [2011] ZASCA 30 (23 March 2011).

[133] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 4. Section 41(3) of the Sectional Titles Act 95 of 1986 permit owners of unit(s) in a sectional title scheme to have the *curator ad litem* appointed to represent the interests of the body corporate.

[134] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 1.

[135] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 9, 27-28.

[136] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 5.

to each deed of sale in relation to the common property, thereby converting portions of the common property into units that could be misappropriated. This was done without the knowledge and consent of the first purchasers. On the transfer of the units to the first purchasers, the developer pretended to deliver what they had contracted for and obtained payment of the purchase price on that basis. This caused certain portions of the common property to cease to exist. The developer further placed those illegally obtained sections beyond the reach of the body corporate by transferring them to the corporate entities.[137]

The court had to decide: "Whether the doctrine of notice avails the prior purchaser, as here, where first, the dispositive act has the effect of creating new objects of ownership out of the property that is already the subject of a prior personal right, and second insolvency intervenes."[138] Applying the doctrine of notice,[139] the court held that Meridian Bay and other subsequent purchasers had actual knowledge of the rights of the first purchasers of the sections, but nonetheless chose to acquire the disputed sections with knowledge that such acquisition was in conflict with the first purchasers' rights.[140] Furthermore, the liquidators could not acquire greater rights than the insolvent entities had or transfer more rights than they themselves had.[141]

The Supreme Court of Appeal, referring to McKerron[142] and *Bowring NO v Vrededorp Properties CC*,[143] held that the absence of contractual privity between the third

[137] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 11.

[138] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 26.

[139] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 26.

[140] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 28.

[141] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 26.

[142] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 18.

[143] 2007 (5) SA 391 (SCA) 15.

purchaser and the first purchasers was no bar to affording the latter a right to claim transfer directly from the former.[144] The compelling circumstance for allowing the first purchasers to claim transfer directly from the subsequent purchasers was that the developer's estate had been sequestrated and the two corporate entities wound-up. Accordingly, had Meridian Bay and the developer been restored to the positions they occupied prior to the transfer of the disputed sections to Meridian Bay, the first purchasers would have had to stand in line with the other creditors in the insolvent estate of the developer and his two companies. This would have resulted in a windfall for the creditors in those insolvent estates to which they would not have been entitled. The court accordingly gave permission to the *curator ad litem* to recover the disputed sections directly from Meridian Bay.[145]

In light of the preceding review of case law and literature, it is clear that the function of the doctrine of notice in double and successive sales is to protect a holder of a prior personal right against a holder of a subsequently acquired real right who intends to prevent the prior personal right from being registered. In other words, the doctrine operates to force the holder of a subsequently acquired real right to give way to a prior personal right (*ius in personam ad rem acquirendam*) so that such right can be registered and so become a real right. The only requirement for application of the doctrine of notice in double-sale situations is knowledge by the subsequent acquirer of the prior purchaser's personal right.

[144] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 30.

[145] *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 31.

South African practice requires that a prior purchaser should seek an order to set aside the transfer of property to a subsequent purchaser and re-transfer of the property from the subsequent purchaser back to the seller who must then transfer it to the prior purchaser. However, the Supreme Court of Appeal has recently held that in certain double and successive-sales situations (eg, where the seller and/or intermediate purchasers are insolvent), the prior purchaser could be allowed to claim *directly* from the subsequent acquirer of a real right, thus, without the seller and/or intermediate parties being involved in the litigation. Seemingly, this exception is based on equity and efficiency.

3 3 3 Sales in conflict with an option, a right of pre-emption or a duty not to sell land without a party's prior approval

It is important to state that an option, a right of pre-emption, and a right to prevent a sale without the approval of a certain person, give rise to rights purely personal in nature. If an owner grants an option or a right of first refusal to a potential purchaser regarding his or her farm, the option holder, depending on the terms of the agreement, obtains a purely personal right.

An option to purchase consists of two distinct stages: an option to purchase; and an agreement to keep the offer open, usually for a fixed period. After the option agreement has been concluded, it is not required for the conclusion of the contract of sale that the offer must be repeated. The undertaking to keep the offer open (the option agreement) is a *pactum de contrahendo* and not an alienation and, therefore, need not be in writing.[146] By contrast, a right of pre-emption is a *pactum de contrahendo* of a particular kind. It is a

[146] *Kretzmann v Kretzmann and Another* (2644/2018) [2019] ZAECPEHC 54 (27 August 2019) para 13.

conditional preferential right to purchase which grants the grantee the right to purchase on the fulfilment of the condition. The condition is generally that if the grantor decides, wishes, or proposes to sell he or she must first offer the property to the grantee. A right of pre-emption does not compel the grantor to sell: it only requires him or her to give the grantee preference in the event that he or she does sell, and thus prevents him or her from selling to a third party during the existence of the right. When the condition has been met and the offer of a third party is on the table, it grants the holder of the right of pre-emption an opportunity to make a similar offer.[147]

In *McGregor v Jordaan and Another*,[148] Jordaan executed a mortgage bond over his farm in favour of McGregor. In addition to the usual clauses, Jordaan agreed that McGregor should have the sole and exclusive right and option to purchase the farm if Jordaan desired to sell, or if the farm became marketable in any manner for a price not exceeding £500. Subsequently, Jordaan concluded a written contract of sale in which he agreed to sell one-half of the farm to Buhr on certain terms. It appeared that Buhr had knowledge of the right of pre-emption granted under the mortgage bond. The Cape Provincial Division held that McGregor was entitled to an order declaring the sale between Jordaan and Buhr void and interdicting Jordaan from giving and Buhr from receiving transfer of the half share in the farm. Kotzé JP reasoned as follows:

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[147] *Kretzmann v Kretzmann and Another* (2644/2018) [2019] ZAECPEHC 54 (27 August 2019) para *Hartsrivier Boerderye (Edms) Bpk v Van Niekerk* 1964 3 SA 702 (T) 705H-706A; T Naudé "The rights and remedies of the holder of a right of first refusal or preferential right to contract" (2004) 121 *SALJ* 636- 643; JC Sonnekus "Regshandelinge in stryd met opsies en voorkoopregte enersyds en andersyds handelinge verrig deur regsubjekte onderworpe aan beperkinge van hul kompetensiebevoegdhede – inhoudelik nie-verwarbaar" 2018 *TSAR* 629-630.

[148] 1921 CPD 301.

> "[T]he person, who possesses the pre-emptive right, like the prior purchaser, has only a personal right of action or claim (*inschuld*), when his right has been infringed; but as the law protects such personal right of a prior purchaser, as against a defendant who knowingly purchased in violation thereof, …. there is no reason why the las should not equally apply and be extended in protection of the possessor of a pre-emptive right as against a defendant, who has, in the present case, knowingly purchased in spite of such prior right of pre-emption. The object of the law is at all times to discourage and prevent fraud; and conduct such as that of which the second defendant has been guilty, amounts to fraud…… . The second defendant is, therefore, in the same position as he would have been in, the plaintiff being a prior purchaser, for he knowingly acted in breach of the plaintiff's prior right of pre-emption; and so, likewise, has the first defendant, Jordaan, who sold half the farm to the second defendant in breach of such pre-emptive right".[149]

Note that the Judge-President did not mention that the right of pre-emption was a purely personal right and not a personal right *ad rem acquirendam*, but merely extended the doctrine to apply to the case where the second purchaser had knowledge of the pre-emptive right of McGregor on the same basis as where a second purchaser had knowledge of a contract of sale concluded between the seller and the first purchaser. The same fraud (as the notice was construed in this case), as exists in the latter scenario, was found to be present in the former scenario.

The simplified facts of *Le Roux v Odendaal and Others*[150] are the following. The first respondent, Odendaal, was the registered owner of certain land transferred to him in terms of an agreement between himself and the applicant, Le Roux. In terms of the agreement, if Odendaal at any time wished to sell the land, he was bound, first to offer it

[149] *McGregor v Jordaan* 1921 CPD 301 309

[150] 1954 (4) SA 423 (N).

to Le Roux at the highest price offered him. On 2 March1954 Le Roux exercised his option and bought the land at the highest offer made at that stage. As Odendaal's attorneys did nothing to enable transfer of the land, Le Roux instituted court proceedings on 31 March for an order directing Odendaal to transfer the land to him. The second respondents opposed the application on the ground that on 5 January 1954 they had bought the land, together with other land, from Odendaal without knowledge of Le Roux's pre-emptive right. They were given occupation of the land during January 1954, and had carried on normal farming operations there ever since. Although their purchase of the land had been in ignorance of Le Roux's pre-emptive right, they had shortly afterwards became aware of it, and some two months later became fully aware that it had been exercised. The court found that Le Roux's prior right of pre-emption placed her in the same position as a prior purchaser and held that Le Roux had a right to specific performance unless there were special circumstances affecting the balance of equities.[151] Judge-President Broome stated clearly:

> "I may add that, in regard to the matter under discussion, I can see no difference in principle between an option and a right of pre-emption; in each case the holder is entitled, by the due exercise of his right, to become the purchaser. The position then is that Le Roux is in the same position in law as if she had actually purchased the property prior to the date of the second respondents' purchase."[152]

As in the previous case, the court did not consider that the right concerned was a purely personal right and not a right *ad rem acquirendam*. The significance of the case is that we are here dealing with the race to the deeds registry, and that the applicant was given

[151] *Le Roux v Odendaal and Others* 1954 (4) SA 423 (N) 443F.

[152] *Le Roux v Odendaal and Others* 1954 (4) SA 423 (N) 442E-F.

the right to effect transfer as he had acquired the personal right to register the farm in his name.

The extension of the doctrine of notice to cover notice of a right of pre-emption was also confirmed in the following statement by Van Heerden AJA in *Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere*[153]

> "Spesifiek wat 'n voorkoopsreg betref, dien daarop gelet te word dat Berlichius en van Zuthen beide nie enige vorm van bedrog vereis nie , maar bloot verklaar dat die reghebbende na lewering die saak van die kundige derde kan opvorder, en dan byvoeg 'omdat die koper [die derde] te kwade trou was en bedieglik gehandel het'."[154]

In *Vansa Vanadium SA Ltd v Registrar of Deeds*,[155] the court held that the right to prospect *per se* does not create real rights, and that essentially none of the provisions of the prospecting contract in question gave rise to real rights.[156] Regarding the doctrine of notice, the court found that essentially the doctrine is applicable not to rights which are of a purely personal nature, but only to rights *in personam ad rem acquirendam.*[157] The court then continued with reference to the two cases discussed above, that the doctrine appeared to have been extended to two scenarios only – a right of pre-emption, and an option to purchase land. The court ventured that the reason for the extension was that both these types of contract relate to a purchase of land which in itself is, in view of the

[153] 1982 (3) SA 893 (A) 910E-G.

[154] *Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien(Pty) Ltd en Andere* 1982 (3) SA 893 (A) 910E-G. See also 907E-G where van Heerden AJA summarises the views of the Roman-Dutch law writers.

[155] 1997 (2) SA 784 (T).

[156] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) 784 (T) 794E-I and 795J-796D.

[157] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) 784 (T) 797C-E.

court, a *ius in personam ad rem acquirendam*.[158] This is, of course, not how the courts in the above cases reasoned: both courts merely stated that the same principles applied in these scenarios as in the instance of a double sale where the knowledge by the second purchaser of the contract entered into by the first purchaser, prevents him or her from acquiring or retaining a real right in the object of the sale.

Cussons v Kroon[159] dealt with a partnership asset which was sold to a purchaser who had knowledge of the partnership and that the asset could not be sold *without the prior approval* of the other partner. The court referred to *Vansa Vanadium SA Ltd v Registrar of Deeds*[160] and held that there was no reason why the doctrine of notice could not apply where a person has a right that property may not be sold without her prior approval.[161] The basis for the court's decision was that there was *no difference between an option to purchase land* and the right that property may not be sold without a certain person's prior approval.[162] Streicher JA was at pains to emphasise that the operation of the doctrine of notice does not depend on the protected right being a personal right *ad rem acquirendam*: knowledge on the part of the purchaser of *a mere personal right* was

[158] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) 784 (T) 797F-G.

[159] *Cussons v Kroon* 2002 (1) All SA 361 (A).

[160] 1997 (2) SA 784 (T).

[161] *Cussons v Kroon* 2002 (1) All SA 361 (A) para 13. See further AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229.

[162] *Cussons v Kroon* 2002 (1) All SA 361 (A) 13.

sufficient.[163] He ventured that in both instances the person who acted with knowledge of the prior right acted *wrongfully*.[164]

The application of the doctrine to a person who had prior notice of an option was further confirmed in the recent of the Supreme Court of Appeal in *Spearhead Property Holdings Ltd v E and D Motors (Pty) Ltd*,[165] The court held that:

> "If the purchaser had notice of the existence of the option prior to purchasing, he must be taken to have bought the property subject to the lessee's personal right against the landlord to exercise it."[166]

Badenhorst, Pienaar and Mostert argue that the doctrine of notice applies to personal rights in general.[167] Their view is shared by Bobbert, who argues that the Supreme Court of Appeal in *Cussons* should have gone further by declaring the doctrine of notice applicable to all personal rights.[168]

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[163] *Cussons v Kroon* 2002 (1) All SA 361 (A) 11. The theoretical basis for the doctrine was said to be that the purchaser who acquires with knowledge infringes the prior personal right and in so doing acts wrongfully (para 12). AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229 argue that "[i]t is not clear whether the supreme court of appeal extended the application of the doctrine to purely personal rights in general or only to the specific personal right in question, namely the right that property may not be sold without the person's prior approval". However, see MJC Bobbert "Kennisleer word bevestig" (2002) 27 *TRW* 117-122 121.

[164] *Cussons v Kroon* 2002 (1) All SA 361 (A) para 12.

[165] 2009 (4) All SA 417 (SCA).

[166] 2009 (4) All SA 417 (SCA) 453. This complicated case is considered in more detail below.

[167] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 83.

[168] MJC Bobbert "Kennisleer word bevestig" (2002) 27 *TRW* 117-122 120.

Brand[169] is of a view that the doctrine of notice should not be extended to all personal rights. He argues that extensions of the operation of the doctrine of notice should occur incrementally and with reference to considerations of public and legal policy that have been predetermined as relavant.[170]

Van der Walt and Maass are also not in favour of extending the doctrine of notice to prior personal rights which would not establish a competing real right upon registration.[171] Consequently, they do not support the idea of extending the doctrine to cover knowledge of prior personal rights in the case of an option, a right of pre-emption, or a duty not to sell land without a party's prior approval. They argue further that it is not clear whether the court in the *Cussons* and *Spearhead* cases extended the application of the doctrine to purely personal rights in general, or only to the specific personal rights in question. If the doctrine of notice is extended to all personal rights, it would accord personal rights the enforceability status of real rights, since third parties (with knowledge) would have to adhere to these rights simply because they were aware of them. This, they say, is inconsistent with the fundamental principles that distinguish between real and personal rights.[172]

It is clear from the preceding discussion that South African academic writers are divided in their views on whether the application of the doctrine of notice should be

[169] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 35.

[170] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 35.

[171] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229-231.

[172] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229-231.

extended to include an option, a right of pre-emption, or a duty not to sell land without a party's prior approval.

3 3 4 Sales in conflict with security rights

A mortgage is constituted by agreement between the debtor and the creditor accompanied by the registration of a mortgage bond over specific immovable property.[173] Two distinct legal acts are therefore required for the constitution of a mortgage: an agreement to mortgage; and the constitutive act of registration.[174] The agreement to mortgage results in an obligation for the mortgage debtor to constitute a mortgage over the property in favour of the mortgage creditor. The mortgage creditor does not have a real right that he or she can enforce against third parties, but only a personal right to exact performance from the mortgage debtor. However, in accordance with the doctrine of notice, a person who acquires immovable property with the knowledge that the transferor is legally bound to constitute a mortgage bond over the property, acquires the property subject to that obligation.

The two cases referred to as authority for this proposition, both deal with the registration of notarial bonds over movable property.[175] However, the result appears to

[173] *Smith v Farrelly's Trustee* 1904 TS 949 955.

[174] See also R Brits *Real security law* (2016) 481.

[175] *Coaton v Alexander* (1879) 9 Buch 17; *Meyer v Botha and Hergenröder* (1882) 1 SAR 47 49; *Cato v Alion and Helps* 1922 NPD 469. See also *Thienhouse NO v Metje and Ziegler Ltd* 1965 (3) SA 25 (A) 43D-E.

be in line with the basic character of the doctrine of notice.[176] Some authors further cite the complicated case *Thienhouse NO v Metje and Ziegler Ltd*[177] in support.[178]

3 3 5 Unregistered servitudes

Van der Merwe and De Waal[179] define a servitude as a limited real right which imposes a burden on movable or immovable property by restricting the rights, powers, or liberties of its owner in favour of either another person (in case of a personal servitude), or the owner of other immovable property (in case of a praedial servitude).[180] Badenhorst, Pienaar and Mostert define a servitude as a limited real right or *ius in re aliena* which entitles its holder either to use and enjoy another person's property, or to insist that the other person refrain from exercising certain entitlements flowing from his or her right of

[176] CG van der Merwe *Sakereg* (2nd ed 1989) 622; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 86.

[177] *Thienhouse NO v Metje and Ziegler Ltd* 1965 (3) SA 25 (A) 43D-E.

[178] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 84.

[179] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & FA Faris (eds) *LAWSA* vol 24 (2nd ed 2010) para 540. See also CG van der Merwe "Servitudes and other real rights" in F Du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 591-629 593.

[180] In *Consistory of Steytlerville v Bosman* (1893) 10 SC 67 69, De Villiers CJ described servitudes as "[b]urdens with which land may be affected in favour of persons, other than the owner. They are real rights which have been carved out of the full *dominium* of the owner and transferred to others, but they can only be enjoyed by the transferee, so long as he is the owner of the dominant tenement, in respect of which the right has been created." In *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049B-C the court stated that "[a] servitude is, of course, a right belonging to one person in the property of another entitling the former either to exercise some right or benefit in the property or to prohibit the latter from exercising one or other of his normal rights of ownership."

ownership over and in respect of the property which he or she would have were it not for the servitude.[181]

Fundamentally, there are two ways of creating servitudes: original (*ex lege*) acquisition; and derivative acquisition.[182] Servitudes in land created by operation of law (*ex lege*) come into existence without the cooperation of the servient owner[183] and do not require registration to be valid and enforceable as limited real rights[184] – although it is advisable to register such servitudes for the sake of publicity and legal certainty.[185]

In *Cillie v Geldenhuys*[186] a new owner of the servient tenement argued that he was not bound by the servitude because he had no knowledge of it when he took transfer of the land. The servitude in question was acquired by prescription against the servient owner's predecessor in title. The Supreme Court of Appeal pointed out that the new owner's attempted defence of lack-of-knowledge of the servitude was misplaced because the doctrine of notice does not apply in the context of acquisitive prescription. The court

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[181] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 321. See also CG Hall & EA Kellaway *Servitudes* (3rd ed 1973) 2.

[182] AJ van der Walt *The law of servitudes* (2016) 279.

[183] This includes servitudes created by legislation, expropriation, acquisitive expropriation or as rights of way of necessity: See AJ van der Walt *The law of servitudes* (2016) 336.

[184] AJ van der Walt *The law of servitudes* (2016) 337. See also *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 13.

[185] AJ van der Walt *The law of servitudes* (2016) 281. AJ van der Walt *The law of servitudes* (2016) 281 indicates that publicity in this context does not have the function of creating the limited real right; servitudes that are created *ex lege* are limited real rights and therefore enforceable against others (including successive owners of the burdened land) regardless of their knowledge of the existence of the servitude. When it is said that it is advisable to have these servitudes registered for the sake of publicity the idea is to protect the servitude holder against further litigation by new owners of the burdened land who refuse to acknowledge the existence of the servitude.

[186] *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA).

explained that a real right acquired through original acquisition (including acquisitive prescription) vests in the holder without registration. Therefore, any knowledge of the right by the new owner of the servient land or his or her predecessor in title's consent is irrelevant.[187] Van der Walt argues that the above passage from *Cillie v Geldenhuys* should put an end to lack-of-knowledge defences in acquisitive prescription cases.[188] In view of the decision in the *Cillie* case and academic literature, it can be stated with confidence that the doctrine of notice does not apply where servitudes are created *ex lege* because these rights do not require cooperation between their holder and servient land and registration to be enforceable *erga omnes*. Consequently, there is no passing of ownership between the previous owner and the new owner.

In contrast to servitudes created *ex lege*, most servitudes in land come into existence upon registration against the title deed of the servient land. This includes all consensual (derivative) servitudes, in other words, servitudes created by private grant in a contract, in a will, by reservation in a deed of transfer, or in a subdivision.[189] In *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*,[190] Innes CJ stated:

> "Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale of land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram*

[187] *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 13

[188] AJ van der Walt *The law of servitudes* (2016) 26.

[189] AJ van der Walt *The law of servitudes* (2016) 102.

[190] 1918 AD 1.

> *lege loci* by an entry made in the Register and endorsed upon the title deeds of the servient property."[191]

The duty to register servitudes in land before they acquire the character of limited real rights derives from the Deeds Registries Act.[192] Most important here are sections 16 and 63(1). Section 16 of the Act prescribes that real rights in land (other than ownership) may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar. Section 63(1) prohibits registration of personal rights and conditions that do not restrict the exercise of ownership in respect of land. Section 3(1)(*o*) of the Act obliges the registrar of deeds to,

> "register any servitude, whether personal or praedial, and record the modification or extinction of any registered servitude."[193]

The implication of these provisions is that any unregistered, consensually acquired right in relation to use of another person's land, does not have the effect of a limited real right. To be capable of registration such a right should qualify as right that would restrict the exercise of ownership in land.

An important question regarding servitudes acquired by derivative acquisition is whether they are enforceable against successive owners of the servient land, and (in the

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[191] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16.

[192] 47 of 1937.

[193] Other provisions on point are ss 66 & 67 of the Deeds Registries Act 47 of 1937, which deal with the registration of personal servitudes, while section 66 proscribes the registration of personal servitudes of usufruct, *usus* or *habitation* that purport to extend beyond the lifetime of the person in whose favour they are created. Sections 75 and 76 deal with the creation and registration of praedial servitudes. See further AJ van der Walt *The law of servitudes* (2016) 104.

case of praedial servitudes) whether successive owners of the dominant land can enforce them.[194]

Van der Walt indicates that before registration, the validity and enforceability of servitudes acquired derivatively rests on the servitude-creating contract alone as prospective rights that may exist prior to registration. These rights are personal rights valid and enforceable as between the parties to the contract, but not against successive owners of the servient land, or (in the case of praedial servitudes) by successive owners of the dominant land.[195]

Carey Miller states that an agreement to constitute a praedial servitude gives rise to no more than a personal right, as a real right to a servitude is acquired only by registration. Prior to registration of the servitude against the title deeds of the servient tenement, the owner of the dominant tenement acquires no more than a personal right to claim registration (*ius in personam ad servitutem acquirendam*).[196] The purpose of registration is to create limited real rights in land, in other words rights that are enforceable by all successive owners of the dominant land, against all successive owners of the servient land.[197]

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[194] AJ van der Walt *The law of servitudes* (2016) 103. DL Carey Miller *Land title in South Africa* (2000) 94 states that "[f]rom the point of view of the acquisition of ownership in land the important question is to what extent an acquiring owner is bound by conditions which are not reflected against his title deed."

[195] AJ van der Walt *The law of servitudes* (2016) 103 .

[196] DL Carey Miller *Land title in South Africa* (2000) 94. AJ van der Walt *The law of servitudes* (2016) 103 states that prior to registration the content of a servitude-creating contract relate to interim use rights and the obligation to cooperate in the registration of a servitude.

[197] AJ van der Walt *The law of servitudes* (2016) 103. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 238 indicate that in South Africa, registration serves a dual function. Firstly, it indicates the act of delivery in respect of derivative acquisition of immovables.

Van der Walt argues that,

> "[d]octrinally, it cannot be said that registration transforms a personal right into a real right; the better explanation is that only a personal right can exist prior to registration and that the real right that is created upon registration replaces the previous personal right."[198]

After an agreement to constitute a servitude in favour of the dominant tenement but before its registration, it may happen that the servient owner sells the land to a third party, and subsequently registers the title to the land in the name of the latter. In principle, the subsequent acquirer of the land acquires ownership unaffected by a servitude-creating agreement between his or her predecessor in title and the dominant tenement owner.[199] However, if the subsequent owner of the servient land was aware of the servitude-creating agreement before accepting transfer of the land, the doctrine of notice compels him or her to cooperate in the registration of the servitude, or do nothing which may prevent its registration.[200] An unregistered servitude is, strictly speaking, a contradiction

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Secondly, it provides a public record of real rights in land. As such, it aims to avoid the problem of double sales of land and to give landowner's creditors the opportunity to assert their claims before the debtor parts with ownership through the public process of registration and transfer.

[198] AJ van der Walt *The law of servitudes* (2016) 103.

[199] DL Carey Miller *Land title in South Africa* (2000) 94.

[200] For case law regarding the application of the doctrine of notice in the case of unregistered servitudes see *Richards v Nash and Another* (1881) 1 SC 321; *Judd v Fourie* (1881) 2 EDC 41 52; *Jansen v Fincham* (1892) 9 SC 289; *Pienaar v Van Zyl* (1899) 16 SC 260; *Ridler v Gartner* 1920 TPD 249 259-260; *Manganese Corporation Ltd v South African Ltd* 1964 (2) SA 185 (W) 192H*; Grant and Another vStonestreet and Others* 1968 (4) SA 1 (A) 20A-C; *Kessoopersadh v Essop* 1970 (1) SA 265 (A) 277H-278C; *Dhayanundh v Narain* 1983 (1) SA 565 (N) 571F-G 573C-D; *Bezuidenhout v Nel* 1987 (4) SA 422 (N) 428H-429C; *Hassam v Shabodien* 1996 (2) SA 720 (C) 725F-G. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 85; DL Carey Miller *Land title in South Africa* (2000) 94; DL Carey Miller *The acquisition and protection of ownership* (1986) 198-200.

in terms in that an unregistered use right in land does not constitute a servitude until it has been registered.[201]

In one of the earliest cases to apply the doctrine of notice, *Richards v Nash and Another,*[202] the then owner and seller (A) of certain adjoining plots of land 18, 19, 20 and 21, sold plot 20 to purchaser (B), and reserved a right of way over plots 18 and 19 in favour of plot 20. However, upon transfer of plot 20 to purchaser (B), the seller (A) omitted to register the right of way over the title deeds to plots 18 and 19. B's agents who were conveying the land, accepted the title deed to plot 20 without a right of way being registered in favour of B. A then sold and transferred plots 18 and 19 to C, who bought them with knowledge of the intended right of way in favour of plot 20. Again, the servitude in favour of plot B was not registered against B and C's title deeds. As soon as B became aware that the servitude had not been registered against his and C's title deeds, he immediately called it to the attention of his agents and sought to have the mistake rectified.[203]

The plaintiff contended that by taking transfer of the land with knowledge that it was subject to an unregistered servitude, C's action amounted to fraud against B.

[201] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2nd ed 2010) para 616 argue that a right to a servitude is ineffectual in burdening the servient land unless it is duly registered in the registry of deeds and endorsed upon the title deeds of the servient land. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 334 indicate that a duly executed agreement to grant a servitude (or so-called unregistered servitude) gives rise to a real right only when it has been registered.

[202] (1881) 1 SC 312.

[203] *Richards v Nash and Another* (1881) 1 SC 312 315.

Accordingly, the plaintiff claimed specific performance, namely to rectify the title deeds of plots 18 and 19 to reflect the servitude in favour of plot 20.

The court rejected the defendants' argument that the seller (A) had not sold the land subject to a right of way.[204] The legal question was whether B was entitled to specific performance – ie, to have an omission to register a servitude against C and his title deeds rectified. The court held that C bought the land while aware of the unregistered servitude and was therefore bound, in terms of the doctrine of notice, to cooperate in having the servitude registered against C's title deed.[205]

In *Grant and Another v Stonestreet and Others*,[206] the then Appellate Division held that:

> "Having regard to our system of registration, the purchaser of immovable property who acquires clean title is not lightly to be held bound by an unregistered praedial servitude claimed in relation to that property. If, however, such purchaser has knowledge, at the time he acquires the property, of the existence of the servitude, he will - subject to a possible qualification, discussed below, relating to cases where there has been the intervention of a prior innocent purchaser - be bound by it notwithstanding the absence of registration."[207]

Recently, in *Bowring NO v Vrededorp Properties CC*,[208] the Supreme Court of Appeal dealt with the application of the doctrine of notice in both the double-sale and

[204] *Richards v Nash and Another* (1881) 1 SC 312 317.

[205] *Richards v Nash and Another* (1881) 1 SC 312 318.

[206] 1968 (4) SA 1 (A).

[207] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20A-B. See further *Dhayanundh v Narain* 1983 (1) SA 565 (N) 571-574; *Bezuidenhout v Nel* 1987 (4) SA 422 (N) 428H-429C; *Hassam v Shabodien* 1996 (2) SA 720 (C) 725F-G.

[208] 2007 (5) SA 391 (SCA).

unregistered-servitude situations. Vrededorp sought an order in the high court to direct the Trust to subdivide a certain portion of land and to transfer a defined subdivided portion to it, and to have a servitude of way registered in its favour over the remainder of the property. The Trust raised a counterclaim against both claims. The court a *quo* granted the main claim and refused the counter claim. The Trust appealed the judgment of court *a quo*.

In considering whether registration of the servitude could be claimed from the second purchaser (now the registered owner), the Supreme Court of Appeal had to determine the issue regarding the claim for transfer of the subdivided portion. This was because unless that transfer could take place, the servitude would be a nullity as there can be no servitude over one's own property. The court applied the doctrine of notice. and held that the respondent could claim the subdivision and transfer of the portion directly from the second purchaser. The court also compelled the second purchaser to cooperate in the registration of the servitude in favour of Vrededorp.[209]

There is controversy regarding whether a servitude grantee should be entitled to the interim use of the land (where the doctrine of notice is applicable) pending registration of the servitude-creating agreement. In one of the earliest reported cases, *Steffens v Bam*,[210] it was stated:

> "There may be cases where under a special agreement the purchaser might be entitled to the use of a servitude before actual transfer of such servitude by

[209] *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) 26.

[210] (1903) 20 SC 1.

> registration, or where the seller, having allowed him to use the servitude before registration, would be prevented from obstructing such use."[211]

In *Potgieter v Zietsman*,[212] Graham JP stated that:

> "[I]t thus becomes of the utmost importance…to ascertain whether [the new land owner] had notice of the existence of this servitude before his purchase of the farm from the defendant. If he had notice, he would be precluded from refusing to permit the plaintiff the enjoyment of the servitude, and it would follow that any damage sustained by the plaintiff through the interference with the exercise of his rights would be attributable to [the new land owner] and not to the defendant."

Lubbe argues that the above statement of the court in *Potgieter v Zietsman*,[213] shows that a purchaser with notice may be precluded from refusing to permit the grantee the enjoyment of the servitude.[214]

The court in *Van den Berg v Van Tonder*[215] appears to disagree with the finding of the court in *Potgieter v Zietsman*.[216] Having confirmed that the purchaser who bought the land with knowledge of a servitude-creating agreement was bound to cooperate in the registration of the servitude,[217] the court added that the purchaser was *not obliged to acknowledge the servitude prior to registration*. The reason why the purchaser could not be bound by the servitude was that he or she was not a party to the servitude-creating

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[211] *Steffens v Bam* (1903) 20 SC 1 8.

[212] 1914 EDC 32 36.

[213] 1914 EDC 32 36.

[214] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 258.

[215] 1963 (3) SA 558 (T).

[216] 1914 EDC 32 36.

[217] *Van den Berg v Van Tonder* 1963 (3) SA 558 (T) 564D-F.

contract. The only exception to this rule would be where non-observance would cause damage to the servitude grantee. Therefore, if the grantee is already exercising the right, he or she could prevent the purchaser from stopping him or her from exercising his or her right by means of an order amounting to a combination of a spoliation order and an interdict preventing interference with his or her enjoyment of the right.[218]

The judgment in *Van den Berg v Van Tonder* has attracted academic debate regarding interim use of land pending registration of a servitude-creating agreement. Lubbe argues that the convoluted construction in *Van den Berg v Van Tonder* is unconvincing. If the successor with knowledge is not obliged to allow the grantee enjoyment of the servitude prior to registration because he is not a party to the servitude agreement, it is difficult to see why he should be bound to register the servitude because he is not a party to that aspect of the prior agreement either.[219] Lubbe argues that the statement regarding the absence of authority permitting enforcement of the servitude prior to registration is not decisive, and neither is the inconclusive judgment in *Steffens v Bam*.[220] Furthermore, recognising a right to interim substantive enjoyment against the grantor appears to accord with economic realities and general principles regarding the

[218] *Van den Berg v Van Tonder* 1963 (3) SA 558 (T) 564D-F. See also GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 248; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 85; AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 230.

[219] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 257.

[220] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 257.

specific performance of contracts, and to deny that this affects the subsequent acquirer with notice seems artificial.[221]

In *De Witt v Knierim*[222] the court stated that,

> "[a]lthough the servitude in issue here has not yet been registered, it binds the parties to the agreement and is enforceable *inter partes according to its terms ex contractu*. In interpreting the rights of the parties to the servitude at this stage the approach must be the same as would be adopted after registration. Although registration of the servitude will establish it as a real right the intention of the parties will not change."[223]

In Lubbe's view the above passage would suggest that even before registration, a servitude is enforceable *ex contractu* as between the parties to the grant.[224]

Van der Vyver disagrees as can be gathered from the following statement:

> "[W]here the servient property has been alienated and the doctrine of knowledge applies, B cannot in the ordinary course of events continue to use the road; the right which he can uphold against the successor in title is the creditor's right to claim registration of his right of way - which again goes to show that one must clearly distinguish between B's right to claim registration of his right of way and B's right to use the road."[225]

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[221] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 257.

[222] 1991 (2) SA 371 (C).

[223] *De Witt v Knierim* 1991 (2) SA 371 (C) 385.

[224] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 257.

[225] JD van der Vyver "The doctrine of private-law rights" in Strauss SA (ed) *Huldigingsbundel vir Joubert WA* (1988) 201-246 238-239.

While recognising that the grantee of a servitude has a right to exercise it even before registration, he contends that this does not extend to a successor with notice. Accordingly, the doctrine of notice only protects the right to have the servitude registered.[226] Van der Merwe argues that the remedies accorded the holder of a registered servitude may be instituted against the person who acquires the servient tenement with knowledge of an unregistered servitude.[227]

In principle, nothing prevents parties from agreeing on the interim use of the land, which is an object of a servitude-creating agreement, pending the registration of the servitude-creating contract. Accordingly, the contractual interim-use right would be enforceable *inter partes* if it complies with the requirements of the Alienation of Land Act,[228] especially the requirement that the contract should be in writing. Breach of an agreement to use the property in the interim would only entitle either party to claim damages from the other.

In my submission, allowing a holder of a prior personal right to enjoy the servitude before its registration contradicts the basic principle that a derivative servitude only comes into effect by registration. An interim-use servitude cannot be based on the application of the doctrine of notice because the purpose of the doctrine in servitude law is to compel a subsequent acquirer of the servient tenement to cooperate in the registration of the servitude-creating agreement so that it may become a real right, and therefore be

[226] JD van der Vyver "The doctrine of private-law rights" in Strauss SA (ed) *Huldigingsbundel vir Joubert WA* (1988) 201-246 239.

[227] CG van der Merwe *Sakereg* (2nd ed 1989) 543. He refers to *Nott v Liquidator of the Breyton Estates Ltd* 1916 TPD 375.

[228] 68 of 1981.

enforceable against successive owners. In other words, allowing interim use of the land subject to a servitude-creating agreement, on the basis of the doctrine of notice would fly in the face of the very purpose that the doctrine of notice is intended to serve. Therefore, any interim use of the land should be based on a special agreement to use the property and not on the application of the doctrine of notice.

From the preceding discussion, it is clear that an agreement to constitute a servitude is only enforceable between the contracting parties. If, pursuant to the conclusion of a servitude-creating agreement but before registration, the owner sell the land to another person, the latter is, in principle, not bound by the servitude-creating agreement. However, if the grantee (the servient landowner) was aware of the servitude-creating contract when he or she accepted transfer of the land, the doctrine of notice finds application. It is noteworthy that the purpose of the doctrine of notice in the context of the law of servitudes is to compel a new owner who acquired the land with knowledge of servitude-creating agreement to cooperate in the registration of the servitude against his or her title.

3 3 6 Unregistered long-term leases

A lease is an agreement between one party (the lessor) and another party (the lessee) in terms of which the lessor agrees to allow the lessee the temporary use and enjoyment of the property in return for payment of rent.[229] The essential terms of a contract of lease are an undertaking by the lessor that the lessee shall have the use and enjoyment of the

[229] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 427. See further WE Cooper *Landlord and tenant* (2nd ed 1994) 2; G Bradfield & K Lehmann (eds) *Principles of the law of sale and lease* (3rd ed 2013) 137.

specific or identified property for a limited period, in exchange for an undertaking by the lessee to pay a certain or determinable rent.[230] The contract of lease together with the provisions of the Rental Housing Act, regulate the rights and obligations of the lessor and the lessee.[231] Furthermore, section 1(1) of the Formalities in Respect of Leases of Land Act[232] provides that no lease of land shall be invalid merely because it is not in writing.[233] Therefore, a lease of land need not comply with any particular formalities as a prerequisite for validity.

There are two forms of lease: short-term lease and long-term lease. A short-term lease is a lease which is not a long-term lease in terms of section 1(2) of the Formalities in Respect of Leases of Land Act.[234] In practice, short-term leases are not registered against the title deeds of the leased land. Short-term leases create purely personal rights because the object of the lessee and lessor's rights is performance by the parties in terms of the contract. The application of the doctrine of notice is irrelevant in the case of short-term leases as, in the main, the doctrine protects rights *in personam ad rem acquirendam* against a subsequent acquirer of a real right who intends to prevent the right from being registered. Short-term lessees are entitled to enforce their leases against the lessor's

[230] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 428. See further WE Cooper *Landlord and tenant* (2nd ed 1994) 2-3.

[231] 50 of 1999. See especially subsections 4 and 5 of the Rental Housing Act 50 Act.

[232] 18 of 1969.

[233] Nowadays the practice is that leases are reduced into writing. The effect of written leases is that it relieve the lessor as far as possible from his common law obligations and to restrict the lessee's common law right: PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 428. See also K Lehmann "Purchase and lease" in F du Bois (ed) *Wille's Principles of South African law* (9th ed 2007) 906-923 908.

[234] 18 of 1969.

successors in title on the basis of the *huur gaat voor koop* rule regardless of successors' knowledge of the lease.[235] The reasons are often conflict. In such instances, the second is decisive.

A long-term lease is a lease for a period of not less than ten years or one which has been concluded for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee either indefinitely, or for periods which together with the first period of the lease, amount in all to not less than ten years. Although a long-term lease is enforceable between the contracting parties until its expiry date, it must be registered against the title deeds of the leased land to be enforceable for more than ten years against creditors and successors who have acquired the leased property for valuable consideration.[236] The lessee in a long-term lease who fails to register the lease is not left without recourse against the subsequent owner of the leased property in that he or she is protected by the doctrine of notice.[237]

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[235] AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 2382. It is significant to note that in a case where the lessor sells the property during the term of the lease, the short-term lessees are protected by the *huur gaat voor koop* rule. To qualify for protection by the *huur gaat voor koop* rule, the lessees must have been in occupation of the leased property. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 432.

[236] S 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969.

[237] *Lawrence v Bonniwell & Veale* (1897) 7 CTR 118; *Executor of Hite v Jones* (1902) 19 SC 235; *Canavan & Rivas v New Transvaal Gold Farms* 1904 TS 136; *De Jager v Sisana* 1930 AD 84; *Hitzeroth v Brooks* 1964 (4) SA 443 (E) 447E; *Kessoopersadh v Essop* 1970 (1) SA 265 (A); *Total South Africa v Xypteras* 1970 (1) SA 592 (T). See further AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 230; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 84; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 247.

In *Executor of Hite v Jones,*[238] Mr and Mrs Hite (A and B respectively), who were married in community of property, executed a mutual will by which they appointed their children as heirs and the plaintiff (C) as executor of their will, administrator of their estate, and guardian of their minor heirs.[239] The will entitled the survivor of the testators to a usufruct of the entire joint estate during his or her life. On his departure to England, A vested a general power of attorney in B which, amongst others, authorised her to buy and/or sell property, let houses, and collect rent on his behalf.[240] Accordingly, B purchased from D, on behalf of A, a piece of land with knowledge that the premises on the land were leased for a period of one year. The written lease agreement allowed E to renew the lease for a further seven years, fourteen years, or twenty-one years. This was subject to the proviso that should the lessee (E) wish not to renew the lease, he had to notify the lessor a month before the lease expired.[241] It appears that D was not aware that B had purchased the property on behalf of A, although, had he read the declaration of sale carefully before signing it, he would have seen that the purchase was on behalf of A. \after the transfer of the land to A, D notified E of the change of ownership and advised him to continue paying rent to B.[242] Upon the death of A, C took out letters of administration as executor of A's will. He filed an estate inventory which included the premises in question, but allowed B, as usufructuary, to remain in possession. C failed to inform E that B was no longer the owner of the land but only a usufructuary. Hence, before

[238] (1902) 19 SC 235.

[239] *Executor of Hite v Jones* (1902) 19 SC 235 241-242.

[240] *Executor of Hite v Jones* (1902) 19 SC 235 242.

[241] *Executor of Hite v Jones* (1902) 19 SC 235 242.

[242] *Executor of Hite v Jones* (1902) 19 SC 235 242.

the lease expired, E gave notice to B of his intention to renew the lease for a further period of twenty-one years. For some reason the lease was never renewed. However, E remained in occupation and continued to pay monthly rent to B for approximately five years. Upon the death of B, E continued paying the rent to C.[243]

The dispute arose when C sought an order to eject E from the property. E relied on his right of renewal in terms of the lease agreement. He claimed that since C's predecessor in title had been aware of the lease agreement, he was entitled to remain in possession and to have a renewed lease for a period of twenty-one years registered against the title deed of the land.[244] C argued that he had not been aware of the written lease agreement and the doctrine of notice could, therefore, not apply in this case. The court enquired whether C indeed had been aware of the written lease agreement. It found that B had had knowledge of the terms of the lease before she bought the land and accepted transfer on behalf of A. It therefore held that C could not have greater rights as against E than he would have had if A had himself been the lessor.[245]

The plaintiff, C, further contended that after the death of A, E could not exercise his right of renewal of the lease without due notice to C and that the notice of the intention to renew the lease to B was not sufficient. The court rejected this argument and held that the notice of renewal given to B must, under the circumstances, be deemed to have been given to C as he had permitted B to remain as an ostensible owner of the premises. Furthermore, because C was aware that the premises were leased and did not take steps

[243] *Executor of Hite v Jones* (1902) 19 SC 235 243-244.

[244] *Executor of Hite v Jones* (1902) 19 SC 235 244.

[245] *Executor of Hite v Jones* (1902) 19 SC 235 244-245.

to ascertain from B or E the terms of the lease agreement, his argument that he had no knowledge of the written lease agreement as well as that notice was not served to him could not be sustained. Accordingly, the court found in favour of E and declared that he was entitled to have a renewed lease for a period of twenty-one years executed by C and duly registered in the deeds office against the title deed of the premises in question.[246]

In *Canavan & Rivas v New Transvaal Gold Farms*,[247] A, the then owner of an undivided farm, leased an undivided but duly demarcated portion of the farm to B for ten years, subject to a right of renewal for another five years. A few years later B ceded the lease to C (the plaintiff), who used the land for cultivation. However, the cession was not registered in the deeds registry but in the *Diverse Akten*. A then sold the land to D, who in turn sold it to E, a company (the defendant and new owner). In the same month, C gave notice of renewal of the lease to E. However, the new owner E refused to accept the notice on the ground that it was not bound by the lease.[248] C contended that E was bound by the lease because it had been aware of it when it purchased the land. The court held that no actual notice of the lease agreement had been given, either verbally or in writing, to the company and/or any of its directors. However, C argued that E's knowledge of the lease should be inferred from two facts: first from the fact that there was cultivation upon the farm, which ought to have put the intending purchaser upon inquiry when he bought the property. The court, however, found that there had been no cultivation on the farm when E bought it, which meant that E could not have been expected to inquire as

[246] *Executor of Hite v Jones* (1902) 19 SC 235 246.

[247] 1904 TS 136.

[248] *Canavan & Rivas v New Transvaal Gold Farms* 1904 TS 136 138-139.

to the terms of the lease. C contended secondly, that knowledge of the lease on the part of the directors could be inferred from the facts surrounding the flotation of the company. The court held that there was no proof that any of the company directors, its secretary, or its solicitor, had any knowledge of the lease agreement. Hence, the contention founded on actual knowledge of the company could not be sustained.[249]

The second main contention was based on the rule that lease goes before sale (*huur gaat voor koop*). C argued that by reason of the application of this rule the lessor's successor in title was bound to recognise the lease during its existence. The court first had to decide whether the rule applies to a lease for ten years that was not registered against the title deed of the property, or only to leases for less than twenty-five years. The court examined the old authorities on this point and held that the law of Holland which provided that leases for twenty-five years or longer should be registered in order to be enforceable against third parties, was never adopted in South African law. Consequently, the court adopted the ten-year limit.[250] The court therefore held that the lease was a long-term lease and that it would not be binding upon E unless it had been registered in the deeds registry. Furthermore, registration in the *Diverse Akten* did not have a similar effect to registration in the deeds registry. Accordingly, the court held that both grounds relied on by the C should fail.[251]

[249] *Canavan & Rivas v New Transvaal Gold Farms* 1904 TS 136 139-140.

[250] *Canavan & Rivas v New Transvaal Gold Farms* 1904 TS 136 146.

[251] *Canavan & Rivas v New Transvaal Gold Farms* 1904 TS 136 148. Curlewis J concurred with judgment of Innes CJ.

In *Total South Africa (Pty) Ltd v Xypteras and Another*,[252] the first respondent was the owner of two plots of land which the appellant sought to lease. The appellant started negotiations with an agent of the first respondent on the basis that it would lend her a certain sum of money at a certain interest rate per year to enable the agent to erect a garage and filling station on the plots. In return, the first respondent would grant the appellant a lease for a period of twenty years, with an option to renew for a further ten years, over the garage, filling station, and surrounding land which would be required as ancillary to carrying on the business for which the buildings were intended.[253] Subsequently, the appellant undertook to obtain the consent of the local authority for the proposed use of the plots, and the first respondent signed the necessary documents for this purpose. When the plans were drawn up it emerged that the cost of the planned buildings would exceed the amount initially estimated and agreed to by the parties. The appellant was prepared to lend the full amount to the first respondent, but stipulated that the rate of interest for the amount in excess of the amount initially agreed to, would have to be increased.[254] Accordingly, the parties parted on the understanding that an accurate estimate of the building cost would be drawn up and the applicant would in the interim proceed with the application for consent use.[255] A few months later the first respondent sold the plots to the second respondents and assured them that, although there had been negotiations with the appellant in relation to the potential lease of the plots, the parties had not yet arrived at a binding and definite agreement. Accordingly, the second

[252] 1970 (1) SA 592 (T).

[253] *Total South Africa (Pty) Ltd v Xypteras* and Another 1970 (1) SA 592 (T) 594F-H.

[254] *Total South Africa (Pty) Ltd v Xypteras* and Another 1970 (1) SA 592 (T) 596A-D.

[255] *Total South Africa (Pty) Ltd v Xypteras* and Another 1970 (1) SA 592 (T) 596D.

respondent was a *bona fide* purchaser who bought the property without notice of a lease or an agreement to constitute a lease.[256] The appellant sought an urgent interdict to prevent the respondents from passing and taking transfer of the plots pending the final determination of an action to be instituted against the first respondent directing her to register a notarial deed of lease in terms of the agreement between the appellant and the first respondent, against the title deed of the plots.[257]

The court first had to decide whether the negotiations between the appellant and the first respondent constituted a lease agreement. The court upheld the defendants' contention that the negotiations had not reached the stage of agreement on the essentials of a lease as there had not been agreement as to the exact portion of the land to be leased. The court stated that the loan agreement and lease depended on each other – the agreements were inextricably interwoven so that if one failed the other could not stand.[258] Furthermore, it was clear that certain essentials of the loan agreement had not been settled, notably that the full amount of the cost of building which would be the amount of the loan, and the rate of interest to be charged on the amount of the loan in excess of the original amount. The court held that the respondents' contention that the matter was closely related to the lease, which could not be separated from the interest on the loan, was convincing. Consequently, there was no binding agreement of lease between the appellant and the first respondent.[259]

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[256] *Total South Africa (Pty) Ltd v Xypteras and Another* 1970 (1) SA 592 (T) 596D-F.

[257] *Total South Africa (Pty) Ltd v Xypteras and Another* 1970 (1) SA 592 (T) 594A-B.

[258] *Total South Africa (Pty) Ltd v Xypteras and Another* 1970 (1) SA 592 (T) 596F-H.

[259] *Total South Africa (Pty) Ltd v Xypteras and Another* 1970 (1) SA 592 (T) 597A.

The respondents' second main contention was that the appellant was not entitled in law to the relief sought because section 2 of the General Law Amendment Act[260] applied,[261]and the second respondent had purchased the plots without knowledge of the lease. The court stated that even though section 2 of the Act did not require a long-term lease to be in writing or registered against the title deed of the property to have validity between the contracting parties, it is not enforceable or valid against third parties such as the second respondent, unless it has been registered.[262] In other words, while an oral or unregistered lease is valid as between the contracting parties, a lessee who fails to have the contract registered would not be able to enforce his or her rights in respect of the land leased against third parties, unless such a third party was aware of the lease when acquiring the land. As the second respondent had no knowledge of the lease, the court held that the second respondent was not in law bound to recognise the lease agreement between the appellant and the first respondent. Therefore, the second respondent was entitled to transfer of the property free from the burden of the lease. The appeal was dismissed.[263]

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[260] 50 of 1956.

[261] Section 2 of the General Law Amendment Act 50 of 1956 provides that: "No lease of land shall be invalid merely by reason of the fact that such lease is not in writing: Provided that no lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period of the lease amount in all to not less than ten years, and no cession of such lease, shall be valid as against third parties if executed after the commencement of this Act, unless registered against the title deeds of the leased land." This section has been repealed by s 1(2) of the Formalities in Respect of Leases of land Act 18 of 1969.

[262] *Total South Africa (Pty) Ltd v Xypteras and Another* 1970 (1) SA 592 (T) 597E-H.

[263] *Total South Africa (Pty) Ltd v Xypteras and Another* 1970 (1) SA 592 (T) 598E-F.

The common-law principle that protects the holder of an unregistered long-term lease against a subsequent acquirer, has since been enacted in legislation. Section 1(2) of the Formalities in Respect of Leases of Land Act[264] defines a long-term lease as a lease for a period of not less than ten years, or which is renewable from time to time at the will of the lessee indefinitely or for periods which, together with the first period of the lease, amount to no less than ten years. In principle, a long-term lease is binding on the parties to the agreement, but to be valid against creditors and successor in title who have acquired the leased property for valuable consideration for longer than ten years, a long-term lease must be registered against the title deed of the leased land.[265]

Against the backdrop of the cases discussed so far, it appears that the doctrine of notice is applied to protect the holder of an unregistered long-term lease against a subsequent owner of the leased property who intends to obstruct the registration of the lease. However, such a new owner must have been aware of the unregistered long-term lease before or at the time of taking transfer of the leased property. Furthermore, the doctrine only applies to contracts which meet the requirements for a contract of lease. The application of the doctrine of notice in situations of unregistered long-term leases is currently regulated by the Formalities in Respect of Leases of Land Act.

[264] 18 of 1969. This Act came into force on 1 January 1970.

[265] S 1(2)(b) of the Act.

3 3 7 Application of the doctrine in sales in execution scenarios

Reynders v Rand Bank Bpk[266]dealt with a divorce settlement in which Mrs Reynders acquired the former matrimonial home which was registered in the name of her former husband. Before registration in her name, however, the house was attached in execution at the instance of Rand Bank, pursuant to a judgment against the former husband. This created a judicial mortgage and thus a real right in favour of the Bank and left Mrs Reynders with no more than a purely personal claim against her former husband. Relying on the doctrine of notice, Mrs Reynders sought an order setting aside the sale in execution on the basis that the bank was aware of her claim when it caused the attachment to be made. The court found that the judicial authority on double-sales did not support her case. On the premise that the application of the doctrine of notice requires an element of *mala fides*, fraud, or deceit,[267] the court found that a double-sale situation could not be equated with that of an execution creditor who acquired a real right in the property by judicial pledge. In the case of a double sale, the seller (A) and the *mala fide* second purchaser (C), voluntarily entered into a type of fraudulent conspiracy, with the inevitable result of depriving the first purchaser (B) of his contractual claim to the property.

In an attachment and sale in execution, the consequences for B might be the same, but there was no question of the debtor and the judgment creditor acting fraudulently or dishonestly. Presumably, the debtor (A) could not avoid it and the execution creditor (C) might have another option for obtaining payment of its debt. The execution creditor's (C's)

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[266] *Reynders v Rand Bank Bpk* 1978 (2) SA 630. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert and MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 23-24.

[267] *Reynders v Rand Bank Bpk* 1978 (2) SA 630 637A-F.

knowledge could therefore not be to the advantage of Mrs Reynders (B).[268] Consequently, the court concluded that application of the doctrine of notice in both the double-sale and the attachment-in-execution situations, requires *mala fides* with an undertone of a conspiracy to defraud. The only difference between the situations is the inference that can be drawn from the knowledge of the first transaction on the part of the second purchaser (C) (fraudulent), on the one hand, and of the attachment creditor (C) (not fraudulent), on the other.

In *Hassam v Shaboodien*,[269] the defendant relied on *Reynders v Rand Bank Bpk* for his contention that mere knowledge on the part of the execution creditor of a prior personal right arising from a sale concluded between the execution debtor and a third party was not enough because *mala fides* or 'a species of fraud' is required. Friedman JP decided, however, that *Reynders* was no longer good law after the decision in the *Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere*.[270] According to the judge, only the subsequent acquirer's actual knowledge of a prior personal right to acquire a real right coupled with *mala fides* is necessary to trigger the operation of the doctrine of notice in both attachment and sale in execution cases.[271]

In *Dream Supreme Properties 11CC v Nedcor Bank Ltd and Others*,[272] the Supreme Court of Appeal again had an opportunity to consider the application of the

[268] *Reynders v Rand Bank Bpk* 1978 (2) SA 630 637F-638A.

[269] *Hassam v Shaboodien* 1996 (2) SA 720 (C).

[270] 1982 (3) SA 893 (A).

[271] *Hassam v Shaboodien* 1996 (2) SA 720 (C) 728D-J.

[272] *Dream Supreme Properties 11CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA).

doctrine of notice to an attachment in execution. Without pronouncing any express preference, Streicher JA, writing for the majority, appears to endorse the decision in the *Reynders* case. He argued that an inference of fraud should not, as in the case of double sales, be drawn from prior knowledge on the part of an execution creditor who attaches property of the debtor to be sold in execution.[273] Unlike a second purchaser with knowledge of a prior sale, a judgment creditor who causes property to be sold in execution is merely exercising its right to do so in terms of section 36 of the Supreme Court Act 59 of 1959 and the Uniform Rules of Court.[274] According to Streicher JA, the actions of the execution creditor could never be regarded as a species of fraud. To hold otherwise would create the danger of unscrupulous debtors fabricating personal rights, which would be difficult for the creditor to expose for what they are. It would also reduce the effectiveness of a sale in execution and discourage prospective purchasers from taking part in it.[275]

Brand[276] was mystified whether Streicher JA's statement that it would be inappropriate "to extend the doctrine to situations such as the present" meant that the doctrine would not apply to attachments in execution even if the attaching creditor was found to be *mala fide*. In this regard, he referred to the hypothetical case, specifically left open in the *Reynders* case,[277] where the judgment creditor and the judgment debtor

[273] *Dream Supreme Properties 11CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) para 26.

[274] *Dream Supreme Properties 11CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) paras 24 and 26.

[275] *Dream Supreme Properties 11CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) para 26. See also T Naudé "The law of purchase and sale" 2007 *ASSAL* 1039-1054 1054.

[276] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21.

[277] *Reynders v Rand Bank Bpk* 1978 (2) SA 630 638E-F.

fraudulently conspire to defeat the prior personal right of a third party by, for example, the fabrication of indebtedness.[278]

3 4 Conclusion

Against the backdrop of the case law and literature discussed so far, the following conclusions can be drawn. The doctrine of notice is seen to be an exception to the basic principle of South African law that a real right prevails against a personal right when they come into competition with one another. The doctrine of notice provides that, if the acquirer of a real right in land was aware of the existence of a prior personal right that would establish a competing real right upon registration, the acquirer must give effect to the prior personal right.

In a double-sale situation, a holder of a prior personal right to acquire a real right is protected against a subsequent acquirer of a real right who had knowledge of the prior personal right before accepting transfer of the land. Furthermore, an acquirer of a prior personal right is allowed to claim transfer of the property directly from the subsequent acquirer with knowledge. The application of the doctrine of notice in situations of unregistered long-term leases is currently regulated by the Formalities in Respect of Leases of Land Act 68 of 1969. In the law of servitudes, the doctrine of notice compels the subsequent grantee (new owner), who acquired the land with knowledge of a prior agreement to create a yet unregistered servitude, to cooperate in having the servitude registered against the title deed of the land.

[278] FDJ Brand “Knowledge and wrongfulness as elements of the doctrine of notice” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21.

It is not clear whether the doctrine of notice applies only to personal rights to acquire a real right, or to all personal rights, including those that even upon registration will not become real rights. The majority of case law applies the doctrine of notice to personal rights to acquire real rights. However, in certain cases the courts appear to have extended the application of the doctrine to all personal rights, including those that will not become real rights even upon registration. The most notable example is the extension of the scope of application of the doctrine of notice to knowledge of prior options, rights of pre-emption, and instances where the transfer of property is subject to the approval of a specific person. A further issue is the content of knowledge required to trigger the doctrine. Initially the courts required actual knowledge, but also accepted knowledge in the sense of *dolus eventualis* – yellow lights were flickering but the third person nevertheless continues with his or her action to acquire the real right. In the next chapter, we shall see that the controversy surrounding the true scope of application of the doctrine of notice has also led to a theoretical discussion of whether the third party with knowledge acted fraudulently or at least wrongfully. This provided a steppingstone for some academic writers borrow from the law of delict to explain the basis of the doctrine of notice.

Chapter 4

Basis of the doctrine of notice

4 1 Introduction

The peculiar aspects of the doctrine of notice are rendered even more problematic by the uncertainty surrounding the theoretical nature or doctrinal basis of the protection afforded to the holder of a prior personal right in case of notice.[1] As shown in the previous chapter, lack of certainty regarding the basis of the doctrine may have led to unnecessary extension of the scope of application of the doctrine, which may further blur the distinction between personal and limited real rights created by a will or contract involving use of land. Therefore, clarity regarding the basis of the doctrine of notice is important for certainty. For this reason, this chapter examines case law and academic literature in which the doctrine of notice is discussed with the aim of establishing and understanding the reason(s) for granting a prior personal right immunity against a subsequently acquired real right. In other words, the focus falls on the theoretical nature of the doctrine of notice that deviates from several private law principles, especially those of property law and contract law. The first principle, to which the application of the doctrine of notice is an exception, is the principle that a real right always trumps a personal right whenever these two rights compete with one another. Thus, upon application of the doctrine of notice, a

[1] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 249. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30.

personal right trumps a real right. The second principle is the publicity principle. In terms of this principle, all real rights, especially those acquired by derivative acquisition, must be publicised if they are to be enforceable against successors in title. Real rights in land are publicised through registration of the right in the deeds registry. Thus, registration fulfils the publicity principle and its effect is that the consequent real right becomes enforceable against all successors in title. Registration further affords an opportunity to persons with interest in land to check the land registry at the deeds office for any real rights registered against the land. The third principle, from a contact law perspective, is contractual privity in terms of which personal rights only bind parties privy to an agreement. However, upon the application of the doctrine of notice, third parties who were not a party to a contract may be bound by it if they accepted the transfer of a real right with knowledge of the existence of a prior personal right in the same property.

The operation of the doctrine of notice appears to be in a direct conflict with the these South African private law principles because when it is applied, a prior personal right becomes enforceable against a third party who is not part of an agreement between ther predecessor-in-title and a holder of a prior personal right. This enforceability status, in principle, is normally afforded to real rights because these rights are publicised by means of registration in the deeds registry as prescribed by legislation. Moreover, from a doctrinal perspective, the doctrine of notice appears to accord prior personal rights an immunity against divesting upon a change of ownership, which is regarded as the hallmark of real rights.

In section 4 2 the focus is on the judicial pronouncement on or the approach of South African courts with regard to the justification for the doctrine of notice. This section

opens with a discussion, in subsection 4 2 1, of the justification of the doctrine in the earliest South African case law after the reception of the doctrine into Roman-Dutch law in a Dutch court case of the seventeenth century discussed by Dutch jurist, Loenius. The hypothesis is that the discussion of the earliest cases will shed some light on and assist in understanding the reasons for protecting a prior personal right against a subsequently acquired real right. In subsection 4 2 2 the focus is on the next series of early cases pre-1979. This year is important because in 1979 the courts appear to have made a shift from their then settled position. The most recent cases are discussed in section 4 2 3. Various academic views on the doctrinal basis of the doctrine are discussed in section 4 3, whereas conclusions are put forward in section 4 4.

4 2 Judicial pronouncements on the basis of the doctrine of notice

4 2 1 Early case law after reception

The natural starting point in tracing the theoretical nature or basis of the doctrine of notice is clearly when the doctrine was received into South African law. Hence, the discussion of the basis of the doctrine of notice in this section focuses on some of the earliest reported cases. The aim is to establish and understand the underlying reason(s), if any, advanced for the application of the doctrine in those cases. An understanding of the justification for the doctrine of notice in early case law is vital to an understanding of the development of other justifications in subsequent case law and academic discourse.

In perhaps the first South African reported case on the doctrine of notice, *Richards v Nash and Another*.[2] Cooper (the second respondent) sold part of his land to Richards

[2] (1881) 1 SC 312.

(the plaintiff) subject to an agreement to constitute a servitude of right of way over the remainder of the land. Cooper subsequently sold and transferred the remainder of the land to Nash (the first respondent), who was aware of the servitude-creating agreement between Richards and Cooper. It was common cause that the non-registration of the servitude creating-agreement against title deeds of both the servient and dominant tenement was an error. Upon discovering that the servitude-creating agreement had not been registered, the plaintiff sought an order to rectify this omission by compelling the first respondent to allow its registration. The Supreme Court of the Cape of Good Hope had to decide on the possibility of registration of the servitude-creating agreement between the plaintiff and the second respondent against the title deeds of the servient and dominant tenements.

Relying on the Supreme Court's decisions in *Jansen v Pienaar*[3] and *Saayman v Le Grange*,[4] the plaintiff argued that by the transfer of the land to the first respondent by the second respondent without registration of a servitude on the title deeds of the servient and dominant tenements, a fraud was committed on him. As such, the plaintiff argued that he had done nothing that prevented him from seeking the relief sought. The plaintiff further relied on *Jansen v Pienaar*[5] to support his argument that the first respondent

[3] (1881) 1 SC 276.

[4] (1879) 9 Buch 10 12.

[5] (1881) 1 SC 276. In this case, Pienaar wrongful and unlawfully intimidated, induced and enticed the plaintiff's employee (Jacob) to depart from the plaintiff's service by employing him. Because of Jacob's departure from the service several cattle strayed, and were not delivered to its destination. Two of Pienaar's oxen died. The court awarded damages in favour of Pienaar on the ground of wilful interference by the defendant with the contract of employment between the Pienaar and Jacob.

induced the second respondent to breach the contract between the latter and himself. Further reliance was placed on a statement in *Saayman v Le Grange*[6] that,

> "[t]he action to rectify transfer is purely a matter of equity, [. . .] in a case of this nature [the court should] be guided by the decision of the Equity in England."[7]

The plaintiff also relied on the English case of *Le Neve v Le Neve*,[8] in which the court held that,

> "[t]he taking of a legal estate after notice of a prior right makes a person a *mala fide* purchaser; … this is a species of *fraud* and *dolus malus* itself."[9]

The first respondent raised several defences. First, he argued that oral evidence to prove sale of the land with reservation of a servitude was inadmissible; that there was no difference between the sale of land and a praedial servitude; and, so the argument went, there was ample authority to prove that in order to constitute a cession of a servitude, the cession must be made *coram lege loci*.[10] Secondly, the first respondent argued that there was no allegation that the transfer had been erroneous in the plaintiff's pleadings and that the custom in the Cape Colony required that in the case of a transfer of land subject to a

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[6] (1879) 9 Buch 10 12.

[7] *Saayman v Le Grange* (1879) 9 Buch 10 12-13.

[8] *Le Neve v Le Neve* (Tudor's L.C. Eq. vol ii. 32).

[9] *Richards v Nash and Another* (1881) 1 SC 312 316.

[10] *Richards v Nash and Another* (1881) 1 SC 312 316. In this regard the respondent referred to Voet *Commentarius ad Pandectas* (1829 trans by P Gane *Commentary on the Pandect* 1958, hereafter referred as Voet) 8.4.1. Voet states "By our customs such delivery must be made in solemn form *coram legi loci* for the servient tenement to be affected with a real right of servitude and for creditors to be stopped from selling it off under the auction-spear as unencumbered. By familiar practice and undoubted law, alienations of immovables are void if not made in the presence of the law of the place where they are situated; and establishments of servitudes fall under the term "alienation".

praedial servitude, the deed of transfer always mentioned the servitude.[11] Furthermore, the first respondent argued that the plaintiff was neither the *dominus* of the servitude, nor was there a contract between the plaintiff and himself on the basis of which the plaintiff could claim the servitude. Moreover, the first respondent contended that there was no analogy between English law, on which the plaintiff was relying, and South African law. The latter requires registration of a title deed for the transfer of property rights, whereas the former does not. As a result, the argument went, the acceptance of "the so-called equitable doctrine of notice" would destroy the public security in the validity of deeds issuing from the Deeds Registry, and would gather around itself all the subtle and preposterous refinements of English law.[12] According to the first respondent if the equitable doctrine of notice were to be admitted,

> "it would make [the South African] system of registration, hitherto so beneficial, a mere delusion and a sham."[13]

The Supreme Court of the Cape of Good Hope held that the plaintiff bought the land from the second respondent with a servitude of right of way and that the first respondent bought the remainder of the land with knowledge of the servitude. With regard to whether, under the circumstances, the plaintiff was entitled to the relief sought, the court pointed out that it would have been,

[11] *Richards v Nash and Another* (1881) 1 SC 312 316-317.

[12] *Richards v Nash and Another* (1881) 1 SC 312 317.

[13] *Richards v Nash and Another* (1881) 1 SC 312 317.

> "a grave defect in law if the plaintiff [were] not entitled to have a clear error of that kind rectified."[14]

It held that there was nothing that the plaintiff had done which debarred him from being-granted the relief sought. The court explicitly stated that the transfer of land under these circumstances, without a reservation of the right of way in favour of the dominant tenement, was a fraud upon the plaintiff. Therefore, the plaintiff was entitled to have the servitude registered against the title deeds of both the servient and the dominant tenements.[15]

The next early case which pronounced on a justification for the doctrine of notice, is a double-sale case, *Cohen v Shires, McHattie and King*.[16] In this Supreme Court case in the South African Republic (Transvaal), the court held that the second respondents (McHattie and King) committed fraud because they bought the property from the first respondent (Shires) with knowledge of the first sale to the plaintiff (Cohen).[17] For this reason, the court held that the second respondents could not shelter behind the registration of the property in their names. Moreover, the court held that the first respondent could not defend himself on the ground that he was no longer in a position to transfer the property to the plaintiff.[18]

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[14] *Richards v Nash and Another* (1881) 1 SC 312 317-318.

[15] *Richards v Nash and Another* (1881) 1 SC 312 318-319.

[16] (1882) 1 SAR 41.

[17] *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 46: '[They] were well aware of the sale of the farms to by Shires to the plaintiff and,.. .notwithstanding this, they afterwards mala fide bought the same farms from Shires and received transfer thereof.

[18] *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 47.

In coming to its decision, the court relied on literature of the seventeenth century Roman-Dutch law commentators, Domat and Loenius. Domat states that,

> "while on the one hand, the court should not interfere with everything that may not strictly be within the bounds of honesty; on the other hand, it should see that simplicity and uprightness do not become a prey to fraud."[19]

In an opinion expressed in the *Decisien en Observatien*, Loenius[20] argues that:

> "Also, a person having sold his property thereafter selling and transferring the same to another, the last purchaser, who has received transfer, may retain the same, *unless* it was known to him that the seller had previously sold the same things to a third person, and he therefore became *doli particeps;* in that case he may, when defending himself by setting up the last sale and transfer, be repelled by replication *doli,* and made to return the things last bought by and conveyed to him."[21]

[19] This passage comes from Domat *Traité des loix. Le loix civiles dans leur ordre naturel* (1689-1694) 2. The translation is found in *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 46.

[20] *Decisien en Observatien* 80. The translation is likewise found in *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 46. JW Wessels *History of the Roman-Dutch law* (1908) 240 explains that Loenius was a judge of the Supreme Court of Holland, Zeeland and West Friesland. His work is a collection of Dutch cases that were decided from 1621-1641. Loenius was present at the trials that he reported, and was therefore acquainted with the reasons that moved the court to come to the reported decision. It is for this reason that his reports are always considered of such great weight and authority. In 1712 Tobias Boel, Advocate of the Court of Holland, published Loenius' work with numerous annotations. This edition with the notes by Boel is the one always quoted by the lawyers of the eighteenth century.

[21] Although the decisions of the Old Dutch courts are at times consulted to provide clear picture of Roman-Dutch law they are not treated as precedents in South African law: PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 121. See also CG van der Merwe & JE du Plessis *Introduction to the law of South Africa* (2004) 48.

As had the court in *Richards v Nash and Another*,[22] the court in *Cohen v Shires, McHattie and King*,[23] relied on the English case *Le Neve v Le Neve*,[24] and in particular on the statement by Lord Hardwicke that:

> "[T]he taking of a legal estate, after notice of a prior right, makes a person *mala fide* purchaser. This is a species of fraud, and *dolus malus* itself, for he knew that the first purchaser had the clear right to the estate; and after knowing that, he takes away the right of another person, by getting the legal title; and this exactly agrees with the definition of the Civil law of *dolus malus*."[25]

From this discussion of some of the earliest reported case law on the doctrine of notice, it is evident that the reception of the doctrine of notice in South African law was through a reference to the seventeenth century Roman-Dutch decision by Loenius, and English equity. As a result, South African courts advanced *mala fides* or "a species of fraud" and English equitable principles as inherent justifications for the doctrine of notice.

The acceptance of *mala fides* or "a species of fraud" as the basis for justification of the doctrine of notice appears somewhat fanciful. To conclude from the mere knowledge on the part of a third party, that a personal right exists on the property that has been transferred to him, that he acted *mala fide* and committed a "species of fraud" is not acceptable in that a "species of fraud" generally requires a more heinous act on the part of the wrongdoer. Again, to accept the notion of inequitable behaviour leaving it to the judge to decide on the balance of equities which party's conduct was more inequitable in

[22] (1881) 1 SC 312.

[23] (1882) 1 SAR 41.

[24] *Le Neve v Le Neve* (Tudor's L.C. Eq. vol ii. 32).

[25] *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 46.

the circumstances, is not pertinent and too vague to feature as a justification of the doctrine of notice and to explain the practical consequences that flow from the doctrine.

4 2 2 Earlier case law prior to 1979

The earlier case law prior to 1979 attempted to give some content to the notion that fraud or inequitable behaviour on the part of the third party with knowledge of the prior personal right, served as justification for the doctrine of knowledge. In *Jansen v Fincham*,[26] the Supreme Court of the Cape of Good Hope held that if the acquirer of land had knowledge of a servitude-creating agreement before he or she accepted the transfer of the land, it would be fraudulent on his or her part to take advantage of the omission to register the servitude-creating agreement against the title deeds of the servient and dominant tenement.[27] The court stated that if the subsequent acquirer of a real right acquired it without knowledge (notice) of the servitude-creating agreement, and therefore *bona fide*, he or she cannot be bound to observe the servitude. However, if he or she accepted the transfer with such knowledge

> "it would be in the highest degree inequitable to allow him to defeat those rights by taking a transfer which wholly ignores those rights."[28]

[26] (1892) 9 SC 289.

[27] *Jansen v Fincham* (1892) 9 SC 289 293. The court relied on *Richards v Nash and Another* (1881) 1 SC 312 317; *Judd v Fourie* (1881) 2 EDC 41.

[28] *Jansen v Fincham* (1892) 9 SC 289 293.

Accordingly, in the absence of knowledge of the servitude-creating agreement on the part of the subsequent acquirer of a real right, the Supreme Court held that the latter could not be forced to allow registration of the servitude.[29]

The same approach appears from other early decisions. Thus, in *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd*,[30] the then Appellate Division held that if the appellant purchased the land with knowledge of the respondent's prior personal right to acquire a servitude,

> "it would therefore be a fraud on its part to accept and to enforce as against the defendant a clean title."[31]

Likewise, in *Nott v Liquidator of the Breyten Estates Ltd*,[32] Wessels J stated that in terms of South African law, a person only acquires a servitude because of registration. Thus, he or she must have a registered title to the servitude. If he or she does not have a registered title to the servitude, he or she is not entitled to exercise the servitude against a third party who has purchased the property. However, the court stated that there is an exception to this principle. The exception provides:

> "[I]f at the time when the third party purchases the ground he is aware of the fact that there is a servitude upon the property that he buys, then the courts have held that it is *dolus malus* on his part to insist upon having a free transfer simply because that servitude has not been registered in the deeds registry."[33]

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[29] *Jansen v Fincham* (1892) 9 SC 289 294.

[30] 1913 AD 267 280.

[31] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280.

[32] 1916 TPD 375.

[33] *Nott v Liquidator of the Breyten Estates Ltd* 1916 TPD 375 376.

Furthermore, in *Ridler v Gartner*,[34] Wessels J (as he then was) stated that:

> "There must be an element of deceit, an element of chicanery in the transaction, before the Court will set it aside on the ground of knowledge. It must be perfectly clear to the Court that the person who alleges that he bought a clean transfer knew perfectly well and did not expect that he would get a clean transfer except by his fraud. Any other view of the law would be extremely dangerous and would dig away the very foundations upon which our whole system of registration is based."[35]

Similarly, in *McGregor v Jordaan*,[36] Kotzé JP found that it is a clear rule of South African law that if a vendor sells a thing to A and then subsequently sells and delivers the same thing to B who knew of the previous sale to A, A is entitled to claim cancellation of the delivery to B on the basis that the vendor and the second purchaser with notice of the first sale are considered to have acted in fraud of the rights of the first purchaser.[37]

Moreover, in *De Jager v Sisana*,[38] Wessels JA (as he then was) in an *obiter dictum* stated that a purchase of property in derogation of the rights of a third party with knowledge of such rights is a species of fraud upon a third party and does not defeat the third party's rights.[39] He explained that:

> "If A grants to B a servitude, B has a right to that servitude as over against A, and has the right to have that servitude registered. If C knows of the grant, then if he endeavours to get the land free of the servitude he is conspiring with A to defraud B

[34] 1920 TPD 249.

[35] *Ridler v Gartner* 1920 TPD 249 260.

[36] 1921 CPD 301.

[37] *McGregor v Jordaan* 1921 CPD 301 308. See also Voet 6.1.20.

[38] 1930 AD 71.

[39] See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

> of a valid right which he already has against A and which he can by registration acquire against the whole world. C is therefore *particeps fraudis* with A. But where there exists no lease… and where no right has been acquired to the land itself,…and the occupier or squatter has no right *in re aliena*,… [t]he fact that the purchaser knows this cannot make him *particeps fraudis* because there is no fraud upon anybody."[40]

It is clear from the above statement in *De Jager v Sisana*[41] that the doctrine of notice only affords protection to the holders' of a prior personal right to acquire a real right, and not any other holder of a pure personal right, for example labour-tenancy rights.[42] Thus, in this case *the* respondent's prior personal right did not enjoy protection of the doctrine because it was a pure personal right in nature, which even it were to be registered in the deeds office, could not become a real right.

The court in *Manganese Corporation Ltd v South Africa Manganese Ltd*[43] attempted to give more content to the nature of fraud in cases of the doctrine of notice. It stated:

> "[It] would be a species of fraud for a purchaser with notice of a third party's rights to or over the property purchased to attempt to defeat such rights. . . . it is not necessary to prove *dolus* on fraud in the ordinary sense."[44]

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[40] 1930 AD 71 84.

[41] 1930 AD 71.

[42] *De Jager v Sisana* 1930 AD 71 84.

[43] 1964 (2) SA 185 (W).

[44] *Manganese Corporation Ltd v South Africa Manganese Ltd* 1964 (2) SA 185 (W) 193D. The court cited *Jansen v Fincham* (1892) 9 SC 289 293; *Nott v Liquidator of the Breyten Estates Ltd* 1916 TPD 375 376; *De Jager v Sisana* 1930 AD 71 84; RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 178.

The court explained that fraud, in cases where the doctrine of notice applies is committed by the original grantee or seller who tries to sell the land unburdened. If he sells to a person with knowledge of the unregistered burden, his fraudulent scheme does not succeed because the purchaser is regarded as having taken part in the fraud. If he sells the land to a person without knowledge, his fraud is successful. He is the only party to it and he has succeeded in giving to the purchaser greater rights than he himself had. The innocent purchaser is entitled to exercise the rights, that is, use it as if the unregistered servitude does not exist, because he or she has obtained a clean transfer, and did not know of a burden so that he or she was not a party to the fraud. The second purchaser with knowledge of the servitude-creating agreement also has knowledge of the fraud. The court stated that by attempting to take the property free of the burden he or she is, if not knowingly perpetuating the fraud, at least trying to take the benefit which flows from that fraud, whether he or she pays more or not for the land. The court concluded that if the rule should therefore be that he or she is to receive a clean title, he or she would thereby obtain the benefit of a fraud of which he or she knew before acquiring the land.[45]

In *Grant and Another v Stonestreet and Others*,[46] Ogilvie Thompson JA pointed out that a purchaser of immovable property who acquires a clean title is not bound by an unregistered praedial servitude that could be claimed against that property in terms of an unregistered personal right. However, he might be bound by an unregistered servitude if he acquired such property with the knowledge of the unregistered servitude. Furthermore,

[45] *Manganese Corporation Ltd v South Africa Manganese Ltd* 1964 (2) SA 185 (W) 193E-194A.

[46] 1968 (4) SA 1 (A) 20A-F. See also GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250.

the judge explained that the basis of this obligation is that in attempting to repudiate the servitude, the purchaser is *mala fide* and that the law refuses to countenance any such attempted repudiation as in reality it amounts to a species of fraud. The court approved the *dictum* in *Ridler v Gartner*,[47] that there must be an element of deceit or chicanery in the transaction before the court will set aside the transaction; it must be clear to the court that the person who alleges that he or she bought a clean transfer knew perfectly well, and did not expect that he or she would get a clean transfer without his or her fraudulent action. According to Ogilvie Thompson JA, any other view of the law would be extremely dangerous and would erode the foundations of the systems of registration.[48]

In *Tiger-Eye Investments (Pty) Ltd and Another v Riverview Diamond Fields (Pty) Ltd*,[49] the court also confirmed that fraud is a ground for protecting a holder of a prior personal right against a subsequent acquirer of a real right who accepts to transfer the property in the knowledge that it has been promised to a third party.[50]

The importance of the pronouncements on the justification for the doctrine of notice in the preceding discussion is that some of these cases attempt to explain what is meant by accepting some "species of fraud" as justification for the doctrine. Thus, Wessels J in *Ridler v Gartner*[51] stated that there must be an element of deceit, an element of chicanery,

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[47] 1920 TPD 249 259-260.

[48] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20D-E. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[49] 1971 (1) SA 351 (C).

[50] *Tiger-Eye Investments (Pty) Ltd and Another v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C) 358F-G.

[51] 1920 TPD 249 259-260.

in the transaction, before the court will set it aside on the ground of knowledge.[52] In addition, and more importantly, in *Manganese Corporation Ltd v South Africa Manganese Ltd*[53] the court found that to prove a "species of fraud" on the part of the third party, one need not prove *dolus* or fraud in the ordinary sense. The court went on to explain that the real villain of the piece is the seller who sold the property twice and then went on to reflect the fraud of the seller on the second purchaser in the following manner. The second purchaser, having knowledge of the servitude on the land and in an attempt to acquire the property free of the burden, if not knowingly perpetuating the fraud of the seller, is at least attempting to reap the benefit which flows from that fraud. Finally, in *Grant and Another v Stonestreet and Others*,[54] Ogilvie Thompson JA held that the basis for the application of the doctrine in the case of knowledge on the part of the second purchaser, is that the latter is, in reality, attempting to repudiate the burden on the land by continuing with the transaction. As the law refuses to countenance any such attempted repudiation, the second purchaser is deemed to act *mala fide* and is in reality guilty of a "species of fraud."[55]

In a fascinating comment on *Grant and Another v Stonestreet and Others*,[56] Lubbe submits that fraud is virtually used in the sense of the *exceptio doli generalis*.[57] In saying

[52] This view further found support of the Appellate Division in *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20A-F.

[53] 1964 (2) SA 185 (W).

[54] 1968 (4) SA 1 (A). See also GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250.

[55] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20A-F.

[56] 1968 (4) SA 1 (A) 20D-F.

[57] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250.

that the successor with knowledge acts *mala fide* in attempting to repudiate the servitude under such circumstances, and by denoting any such "attempted repudiation" as "a species of fraud", Lubbe submits that the impression is created that the successor's impropriety lies in denying the existence of the servitude, which, because of his acquisition with knowledge, has become operative against him.[58] I agree with Lubbe that this renders the characterisation of the doctrine as a species of fraud superfluous.

The discussion of early case law shows that as early as 1879, most South African courts advanced *mala fides* or a "species of fraud" on the part of a subsequent acquirer of a real right as the inherent justification for the doctrine of notice,[59] while a few cases supplement this with the English law of equity as a possible justification for the doctrine of notice. It is also noteworthy that in *Manganese Corporation Ltd v South Africa Manganese Ltd*[60] the court stressed that it is not necessary to prove fraud in the ordinary sense in the operation of the doctrine of notice.[61] Does this means that fraud, in these cases, should not be understood to mean fraud in narrow sense but rather fraud in the broader sense?

Although fraud has been advanced as a basis for the doctrine in early case law, it has not found unconditional support in academic literature. Critics of fraud as a basis for the doctrine of notice, argue that the conduct of a subsequent acquirer of a real right is

[58] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250.

[59] *Richards v Nash and Another* (1881) 1 SC 312 318. For a contrary view see *De Jager v Sisana* 1930 AD 71 84.

[60] 1964 (2) SA 185 (W).

[61] *Manganese Corporation Ltd v South Africa Manganese Ltd* 1964 (2) SA 185 (W) 193D.

not fraud because the subsequent acquirer of the right does not fraudulently represents to the holder of a prior personal right that he is going to acquire that land free of the charge. The transfer of property to a subsequent acquirer does also not cause the holder of the personal right to act to his or her detriment. Against these requirements for fraud, the critics are adamant that they fail to see why the conduct of the subsequent acquirer is regarded as fraud. As an alternative, the critics suggest that the situations in which the doctrine of notice operates should be dealt with in terms of principles of the law of delict.[62] A further criticism levelled against fraud as a basis for the doctrine of notice is that the explanation of the situations in which the doctrine applies appears to serve no purpose given the explanation in *Grant and Another v Stonestreet and Others*.[63] In my view, it is unclear whether this last criticism of fraud as a basis, as applied in the latter case, should be understood to be Lubbe's overall view regarding the justification for the operation of the doctrine of notice in other situations.

4 2 3 Case law post 1979

From the discussion of early case law in the previous sections, it has emerged that the South African courts' approach was to accept fraud and English equity as justifications for the doctrine of notice. This traditional judicial characterisation was followed

[62] WE Cooper *Landlord and tenant* (2nd ed 1994) 287.

[63] 1968 (4) SA 1 (A) 20D-F. In this regard, see GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250.

consistently by the South African courts, including the Appellate Division, before *Reynders v Rand Bank Bpk*[64] came up for decision in the Transvaal Provincial Division.

In *Reynders v Rand Bank Bpk*,[65] Mrs Reynders, in a divorce settlement, acquired the erstwhile matrimonial home that was registered in the name of her former husband. However, before registration in her name, the house was attached in execution at the instance of Rand Bank, pursuant to a judgment against her former husband. The attachment created a judicial mortgage (*pignus judiciale*) and thus a real right in favour of the bank, while Mrs Reynders's claim rested on a purely personal right against her former husband in terms of the divorce settlement.[66]

Relying on the doctrine of notice, Mrs Reynders sought an order setting aside the sale in execution on the basis that the bank (the creditor) knew of her personal claim against her former husband when it caused the attachment to be made. Counsel for Mrs Reynders, in support of her case, relied on double-sale cases. However, Nestadt J found that the double-sale cases did not support Mrs Reynders's case.[67] Departing from the premise that the application of the doctrine of notice requires an element of *mala fides*, fraud or deceit,[68] the judge reasoned that a double-sale situation could not be equated

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[64] 1979 (2) SA 630 (T) 637F-638A. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 23-24.

[65] 1979 (2) SA 630 (T).

[66] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 631E-632C.

[67] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 637F.

[68] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 637A-G. See also GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 251.

with a judgment creditor who acquired a real right on the property by judicial pledge. Nestadt J stressed that in the case of a second sale, the seller and the second purchaser with knowledge at the time of sale or delivery, voluntarily entered into a type of fraudulent conspiracy, with the inevitable result of depriving the first purchaser of his or her contractual claim to the property. In attachment and sale-in-execution, the consequences for the holder of a prior personal right might be the same, but there is no question of the debtor and the judgment creditor acting fraudulently or dishonestly. The former presumably cannot avoid it; and the latter has or might have no option to obtain payment of its debt but to execute against the property. This being so, the judge argued that he failed to see how the respondent's knowledge of the appellant's prior claim could help the appellant.[69] Nestadt J concluded that the application of the doctrine of notice in both the double-sale and the attachment-in-execution situations, therefore, requires *mala fides* with an undertone of a conspiracy to defraud. The only difference between the situations is the inference that one can draw from the knowledge of the first transaction on the part of the second purchaser, on the one hand, and the attachment creditor on the other.[70] In terms of this view, mere knowledge of a prior personal right by a subsequent acquirer of

[69] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 637H.

[70] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215. See further GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 251-252; FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 23-24.

a real right in sale in execution is insufficient to trigger the application of the doctrine of notice.[71]

It is arguable that the court in *Reynders v Rand Bank Bpk*[72] considered the matter as one where it was asked to extend the scope of operation of the doctrine of notice further than its operation in traditional situations,[73] rather than a situation where the court was asked to create an exception by excluding its operation in attachment and sale in execution situations.[74] The latter is evident from Nestadt J's pronouncement that :

> "In the result I am unpersuaded that either in principle or on authority there is any warrant for extending the rule or applying the principle, that knowledge of a prior personal right in respect of property will destroy the validity of a subsequently acquired real right in it, to the case of a judgment creditor levying execution against the property of his debtor."[75]

However, the court did not rule out the possibility of the application of the doctrine of notice in attachment and sale-in-execution situations were fraudulent action is evident from the dealings between the creditor and the debtor. This is based on the following statements made by Nestadt J:

> "I would pause here to stress that different considerations might well apply in a case where the judgment creditor and judgment debtor fraudulently conspire to defeat the

[71] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 252.

[72] 1979 (2) SA 630 (T).

[73] The classical situations are double and successive sales, unregistered long-term lease and unregistered servitude.

[74] See *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 641G.

[75] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 641G.

> prior personal right of a third party to claim property of the debtor by, for example, the fabrication of an indebtedness. I am not dealing with such a case."[76]

Accordingly, the court rejected the appellant's application to set aside the attachment and sale-in-execution. It held that the judgment creditor is entitled to attach the property of its debtor and have it sold in execution notwithstanding the appellant's prior personal claim against the debtor.[77] To an extent that the judgment in *Reynders v Rand Bank Bpk*[78] still clung to the requirement of *mala fides* or a species of fraud as the basis for the doctrine of notice,[79] it is therefore consistent with the judgments of the high courts and the then Appellate Division prior to 1979.

Shortly after *Reynders v Rand Bank Bpk,*[80] in 1979, the same division of the high court took a 360 degree turn – in *Kazazis v Georghiades en Andere*[81] – in so far fraud or *mala fides* is concerned. In *Kazazis v Georghiades en Andere*,[82] Georghiades sold his shares in a company to Kazazis. Thereafter he sold and delivered the same shares to Hogewind. When Kazazis heard about the second sale, he brought an application to have it set aside. Hogewind contended that, although he knew about the first sale, he

[76] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 638E. See also GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 251-252.

[77] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 641G-H.

[78] 1979 (2) SA 630 (T).

[79] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[80] 1978 (2) SA 630 (T).

[81] 1979 (3) SA 886 (T).

[82] 1979 (3) SA 886 (T).

concluded the second sale in reliance on the assurance from Georghiades and his attorneys that the first transaction had been cancelled.[83]

On the understanding that *mala fides* on the part of the second purchaser is an essential requirement for the application of the doctrine of notice in a double-sale situation, counsel for Hogewind contended that the application to set the second transaction aside should be dismissed. However, without referring to *Reynders v Rand Bank Bpk*[84] the court held that a *proper examination* of earlier authorities indicates that *mala fides* or fraud on the part of the second purchaser is not a requirement for the operation of the doctrine of notice. Though *mala fides* or fraud had been advanced as a doctrinal basis for the doctrine, Spoelstra J reasoned that it was not an element required for its operation.[85] The only requirement was knowledge of the prior personal right by the acquirer of the real right at the time of acquisition. Because Hogewind was aware of Kazazis's personal right, (although unsubstantiated), Spoelstra J concluded that the transaction must be set aside. Spoelstra J added *obiter*, that the position could have been different had Hogewind had reasonable grounds for his belief that the first transaction had indeed been validly cancelled, but since no such grounds existed, his subjective belief to that effect was of no consequence.[86]

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[83] See also Brand FDJ "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 24.

[84] 1979 (2) SA 630 (T).

[85] *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T) 894B-C.

[86] *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T) 893. See further GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 252; FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert &

This *obiter* statement by Spoelstra J raised considerable academic controversy. Brand[87] and CG van der Merwe[88] asserted that the Spoelstra J's *obiter* remarks that reasonable grounds for Hogewind's belief regarding the cancellation of the first transaction could have made a difference, might have led NJ van der Merwe and Olivier[89] to rely on *Kazazis v Georghiades en Andere*[90] in support for their theory. NJ van der Merwe and Olivier's theory is that neither *mala fides* nor actual knowledge of a prior personal right by the subsequent acquirer of a real right, is a requirement for the operation of the doctrine of notice. They argue that the doctrine comes into operation if the acquirer of a real right fails, negligently, to recognise a prior personal right.[91] For this reason, they argue that the doctrine of notice is no more than a variant of the *actio legis Aquilae*, which in principle deserves no recognition as an independent doctrine.[92] NJ van der Merwe had already expressed this view in his earlier academic work, where he argues that there is no room in South African law for an independent existence of the doctrine of notice. He contends that the situations in which the doctrine of notice operates are based on ordinary principles of the law of delict. According to NJ van der Merwe in cases where the acquirer

MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 24; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

87 FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 24.

88 CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

89 NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 280.

90 1979 (3) SA 886 (T).

91 NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 280.

92 NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 280.

of a subsequent real right had actual knowledge of the existence of a prior personal right, the delictual requirements of fault and wrongfulness would be satisfied.[93]

Brand disagrees with NJ van der Merwe and Olivier's view.[94] He shows that in the context of the judgment in *Kazazis v Georghiades en Andere*[95] as a whole, he finds the statement in *Kazazis* relied on by NJ van der Merwe and Olivier rather confusing. According to Brand, if an acquirer of the real right was unaware of the prior personal right, the doctrine of notice would not operate even if the subsequent acquirer's ignorance could be ascribed to negligence. On the other hand, if a subsequent acquirer of a real right has heard of a prior personal right, but is under the *bona fide* impression that it no longer exists because of its extinction through cancellation, negligence on the part of the subsequent acquirer would set the doctrine in motion.[96] Brand points out that the proposition that the negligent infringement of a prior personal right by the acquirer of a subsequent real right will trigger the doctrine of notice, has never found support in South African case law.[97] He argues that even on Spoelstra J's view of relevant legal principles,

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[93] NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 172.

[94] NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 280.

[95] 1979 (3) SA 886 (T).

[96] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 25.

[97] See further FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 27. He states that in light of the statements by the Appellate Division, it can be accepted with confidence that negligence on part of subsequent acquirer is not enough to set the doctrine of notice in motion. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 83 notes that NJ van der Merwe's suggestion that the operation of the doctrine of notice might have led to an extension of the relief claimable by means of the *action legis Aquilie* has not yet received the sanction of our courts. For a similar view see also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

Kazazis v Georghiades en Andere,[98] on its facts, was wrongly decided. In Brand's view, if actual knowledge of a prior personal right by the subsequent acquirer of a real right is a requirement – as Spoelstra J appears to accept in the rest of his judgment – it can hardly be suggested that this requirement was satisfied. This is so because the subsequent acquirer of a real right was under an impression that the prior personal right had been extinguished by cancellation or otherwise. According to Brand, if what is required is actual knowledge of a prior personal right, the argument that the requirement had been satisfied if the subsequent acquirer of a real right genuinely believed that the holder had a prior personal right claim, is unfounded.[99]

What is clear from this discussion of the two conflicting judgments of the Transvaal Provincial Division is that the basis of the doctrine of notice presents a challenge to the courts, especially in cases involving attachment and sale in execution. On the one hand, in *Reynders v Rand Bank Bpk*[100] the court dealt with the operation of the doctrine of notice in attachment and sale in execution scenario, and distinguished it from a double-sale situation. It held that the application of the doctrine of notice in both situations requires *mala fides* with an undertone of a conspiracy to defraud, and that such *mala fides* on the part of an attaching creditor cannot normally be inferred. On the other hand, in *Kazazis v Georghiades en Andere*[101] the court dealt with the operation of the doctrine of notice in a double-sale situation, and took a turn in the opposite direction as to whether the operation

[98] 1979 (3) SA 886 (T).

[99] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 25.

[100] 1979 (2) SA 630 (T).

[101] 1979 (3) SA 886 (T).

of the doctrine of notice in attachment and sale in execution, and double-sale situations requires *mala fides* or fraud. It held that although *mala fides* or fraud had been advanced as the doctrinal basis for the doctrine of notice, it was not a requirement for its operation. The reaction from the academic commentators to these two conflicting judgments was not favourable.

It did not take too long before the then Appellate Division was presented with an opportunity to resolve some of the issues which arose from the apparent conflicting judgments of the Transvaal Provincial Division in *Reynders v Rand Bank Bpk*[102] and *Kazazis v Georghiades en Andere*.[103] In *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere*,[104] the appellant and the second respondent were both involved in the baking industry. They formed a partnership which they operated through a company which held 50 per cent of the shareholding. A provision in their agreement, which was confirmed in the statutes of the company, was a mutual right of pre-emption in the event of either party deciding to sell its shareholding. The appellant then sold its shares to Kessler, who happened to be a shareholder in the second respondent, without offering it to the second respondent. In terms of the sale to Kessler, the appellant again reserved for itself a right of pre-emption in the event of Kessler choosing to resell the shares. When the second respondent became aware of the sale to

[102] 1979 (2) SA 630 (T).

[103] 1979 (3) SA 886 (T).

[104] 1982 (3) SA 893 (A). GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250 states that *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) saw the demise of the fraud construction. See CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

Kessler, it did not follow the legal route, but persuaded Kessler to resell and transfer the shares to it without any notice to the appellant, which was a breach of his agreement with the latter. Unlike the second respondent, the appellant decided to follow the legal route. Relying on the doctrine of notice, it brought an application to have the transaction between the second respondent and Kessler set aside on the basis that the second respondent had knowledge of its right of pre-emption against Kessler when it acquired the shares from him.[105]

The court of first instance dismissed the application to set aside the second sale on the basis that the second respondent's conduct in acquiring the shares from Kessler had not been wrongful in that it did no more than undo the consequences of the appellant's earlier breach of contract.[106] On appeal, Van Heerden AJA (writing for the majority) rejected this argument because of his finding that, by acquiring the shares from Kessler, the second respondent had indeed secured a better position for itself than it would have enjoyed had it followed the legal route by enforcing its rights of pre-emption against the appellant. The court consequently held that the second respondent's

[105] The recital of the facts and decision was gleaned from FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 25-27 as well as CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[106] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 904B-C, as recorded by Van Heerden AJA.

acquisition of the shares with knowledge of the appellant's rights of pre-emption was wrongful.[107]

In the alternative, the second respondent argued that even if it was not legally permitted to acquire the disputed shares directly from Kessler, its acquisition of the shares was not *mala fide,* and for this reason the doctrine of notice did not apply. Van Heerden AJA, however, held that *mala fides* was not a requirement for the operation of the doctrine of notice. The judge referred to and followed the judgment in *Kazazis v Georghiades en Andere*[108] to the extent that the reference to "a species of fraud" and *mala fides* on the part of the acquirer of a real right with knowledge, in earlier cases, was an attempt to explain the doctrinal basis for the doctrine of notice rather than to formulate requirements for its operation.[109] Van Heerden AJA, therefore, cautioned that any reference to fraud or *mala fides* in the context of the doctrine of notice creates confusion and should be avoided. He pointed out that the only requirement for the operation of the doctrine of notice was the subsequent acquirer's actual knowledge (or perhaps *dolus eventualis*) of a prior personal right. Once this requirement has been satisfied, the holder of a prior personal right is afforded what is "in effect a limited real right" against the subsequent acquirer.[110] On the facts, Van Heerden AJA concluded that the appellant had established

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[107] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 911F-H. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 26.

[108] 1979 (3) SA 886 (T).

[109] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910-C.

[110] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910G-H. See also *Cussons v Kroon* 2001 (4) SA 833 (SCA) 9. See also FDJ Brand "Knowledge and

his prior right of pre-emption and that the second respondent had actual knowledge of that right. Therefore, the court held that the second respondent's acquisition of the shares should be set aside.[111]

It is notable that the Appellate Division emphasised that any reference to *mala fides* or fraud in the earlier cases was nothing but a fiction to afford the doctrine of notice theoretical support. As a result, the reference to *mala fides* or fraud must be avoided because it causes confusion.[112] The court therefore endorsed *Kazazis v Georghiades en Andere*[113] and by implication overruled *Reynders v Rand Bank Bpk*.[114]

In *Dhayanundh v Narain*[115] the court dealt with the issues surrounding an unregistered servitude of *habitatio*. The court expressed its concern at the tendency in case law and academic literature to question the correctness of fraud as the basis of the doctrine of notice. It expressed its disapproval of the resulting argument that the conduct of the subsequent acquirer of a real right need be no more than a wrongful and culpable deprivation of the third party's personal rights with regard to an unregistered servitude.[116]

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wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 26.

[111] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 26.

[112] See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[113] 1979 (3) SA 886 (T).

[114] 1979 (2) SA 630 (T). See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 27.

[115] 1983 (1) SA 565 (N) 572A-B.

[116] Referring to statements made by NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 262; NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer

Page J stressed that the acceptance of fraud as a basis for the doctrine has been enshrined in South African law so authoritatively and for so long, that it would take substantial persuasion to convince the courts that it is incorrect.[117] Notably, in the entire judgment there is no reference to the Appellate Division's judgment in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd,*[118] which was delivered three months before *Dhayanundh v Narain* was heard.[119] Nonetheless, the case is critical of the reasoning in both *Kazazis v Georghiades en Andere*[120] and *Grant and Another v Stonestreet and Others*.[121]

In *Hassam v Shaboodien and Others*,[122] the respondent relied on *Reynders v Rand Bank Bpk*[123] to support the contention that actual knowledge on the part of the execution creditor of a prior sale between the execution debtors and a third party, was insufficient to trigger the operation of the doctrine of notice; fraud too must be proven. The court held that *Reynders v Rand Bank Bpk*[124] had been overruled by *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*[125] and

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in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 157 155; *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T) 893; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 24D-E.

[117] See also *Kessooppersadh v Essop* 1970 (1) SA 265 (A) 277F-278C for further confirmation of the "species of fraud" as a justification for the doctrine of notice.

[118] 1982 (3) SA 893 (A).

[119] 1983 (1) SA 565 (N).

[120] *Dhayanundh v Narain* 1983 (1) SA 565 (N) 572A-B.

[121] 1968 (4) SA 1 (A) 24D-E.

[122] 1996 (2) SA 720 (C) 728D-J.

[123] 1979 (2) SA 630 (T). See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 27.

[124] 1978 (2) SA 630 (T).

[125] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A).

accordingly was no longer good law. Furthermore, the court indicated that the underlying premise in *Reynders v Rand Bank Bpk*[126] was that the application of the doctrine of notice requires *mala fides* on the part of the acquirer of a subsequent real right in both attachment-in-execution and double-sale situations. However, in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*[127] that premise was found to be ill-conceived. Friedman JP concluded that what is required in both attachment and sale in execution and double-sale situations, is actual knowledge on the part of the subsequent acquirer of a real right.[128]

Brand argues that in the context of the doctrine of notice, *dolus eventualis* would mean that although the subsequent acquirer of a real right did not have actual knowledge of a prior personal right, he subjectively foresaw the possibility of its existence but proceeded with the acquisition regardless of the consequences to the holder of a prior personal right.[129] Brand points out that although Van Heerden AJA did not refer to *Grant and Another v Stonestreet and Others*[130] as authority for his reference to *dolus eventualis,* his judgment echoes what Ogilvie Thompson JA said in that case:

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[126] 1979 (2) SA 630 (T). See also FJD Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 27.

[127] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A).

[128] *Hassam v Shaboodien and Others* 1996 (2) SA 720 (C) 728D-J. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 27; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[129] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 26.

[130] 1968 (4) SA 1 (A).

> "[A]lthough, unlike the English Law, the doctrine of constructive knowledge has, in our law, little or no application in enquiries of this kind (*Erasmus v Du Toit* 1910 TPD 1037*, Snyman v Mugglestone* 1935 CPD 565), the statement made by Bristowe J, in *Erasmus v Du Toit* 1910 TPD 1049 that if a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice, appears to me to be sound in principle and to merit the approval of this Court."[131]

Brand asserts that in light of these statements by the Appellate Division, one can confidently accept that negligence regarding a prior personal right on the part of the subsequent acquirer of a real right, is not enough to set the doctrine of notice in motion. Therefore, the contrary view of Van der Merwe and Olivier[132] is in direct conflict with positive law.[133] Lubbe contends that the statement by Van Heerden AJA in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* [134] that the doctrine of notice results in personal rights being accorded a "limited real effect" appears to exacerbate rather than resolve the dogmatic puzzle.[135] Van der Merwe prefers the term "relative personal right with real operation" to "a personal right with a limited real effect".[136]

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[131] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20E-F.

[132] NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 278; 253.

[133] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 27.

[134] 1982 (3) SA 893 (A) 910G-H.

[135] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250.

[136] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215 fn 23.

4 2 4 Most recent case law

In *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others,*[137] the Supreme Court of Appeal again had the opportunity to consider the operation of the doctrine of notice in an attachment-in-execution case. The third respondent, Mr Costas, owned a holiday house in Camps Bay. He consecutively failed to pay installments on mortgage bonds on the house because of financial difficulty. On 08 June 2000 Nedcor Bank, one of Costas's creditors, obtained a default judgment against him for payment of the sum of R1 144 409,21 plus interests and costs. On 01 March 2001 Standard Bank Financial Nominees (Pty) Ltd (Standard Bank), another of Costas's creditors, also obtained a default judgment against him for the payment of R720 441,18.[138]

On 15 November 2001, Costas sold the house to Dream Supreme, a close corporation under the control of his mother-in-law, for the sum of R860 000.[139] When Nedcor Bank became aware of the sale of the house to Dream Supreme, it caused the issue of a writ of execution in respect of the house. Standard Bank also caused the issue of a writ of execution in respect of the house.[140] Consequently, the house was attached and sold at a sale in execution to Ms Kirkham (the second respondent) for R1 175 000.[141]

Relying on the doctrine of notice, the appellant (Dream Supreme) sought an order in the Western Cape High Court to set aside the attachment and the sale-in-execution of the house. The appellant argued that the first respondent knew before the attachment

[137] 2007 (4) SA 380 (SCA).

[138] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 384A-B.

[139] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 384E.

[140] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 384H-J.

[141] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 385H.

that it had purchased the property from Costas, and so had a personal claim to have the property transferred to it. It was common cause that Standard Bank was not aware of the sale of the house to the appellant.[142] In defence, the first respondent contended that the sale to Dream Supreme was an attempt to prejudice Costas's creditors and to dissipate his assets after a default judgment had been granted, and that the value of the property far exceeded R860 000.[143]

The Western Cape High Court rejected the appellant's application to set aside the attachment and the sale-in-execution, in the main on the basis that the sale agreement between Dream Supreme and Costas was not a *bona fide* sale but an attempt to shield the property from execution by the creditors.[144] It concluded that the prior personal right of the appellant should not prevail over the subsequently acquired real right.[145] Hence, the appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal pointed out that the only issue that required consideration was whether the appellant was entitled to an order setting aside the attachment of the property at the instance of the first respondent.[146] In other words, the question before the court in essence was which of the conflicting decisions in *Reynders*

[142] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 386B.

[143] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 385I-386A.

[144] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 386E.

[145] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 386G-H, as recorded by Streicher JA.

[146] See *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 392A-C.

v Rand Bank Bpk[147] and *Hassam v Shaboodien*[148] it should it prefer.[149] Streicher JA, writing for the majority, considered the appellant's argument that because the first respondent had knowledge of the appellant's prior personal right before attachment took place, the attachment and sale in execution should be set aside. He pointed out that by attaching the property in execution, the first respondent established a real right known as a judicial pledge (*pignus judiciale*) which entitled it, subject to certain qualifications, to proceed with the sale-in-execution and to the proceeds of the sale of the property.[150] Streicher JA referred to *Hassam v Shaboodien*[151] and *Reynders v Rand Bank Bpk*[152] and without pronouncing any express preference,[153] appeared to endorse the following reasoning by Nestadt J in *Reynders v Rand Bank Bpk*:[154]

> "… [T]he situation of someone purchasing or taking delivery of an article which he knows has been sold to a third party cannot be equated with that of a judgment creditor. In the case of a second sale, the seller and the *mala fide* second purchaser having knowledge, whether at the time he purchases or when he takes delivery, voluntarily enter into a type of fraudulent conspiracy, the necessary and inevitable result whereof is to deprive the first purchaser of his contractual claim to the property. In the case of an attachment, whilst the consequences to the first purchaser might be

[147] 1979 (2) SA 630 (T). See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 28.

[148] 1996 (2) SA 720 (C).

[149] *Dream Supreme Properties 11 CC v Nedcor Bank and Others Ltd* 2007 (4) SA 380 (SCA) 392C-D. See further FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 28.

[150] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 386H-387A.

[151] 1996 (2) SA 720 (C).

[152] 1978 (2) SA 630 (T).

[153] See *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 387B-390B.

[154] 1978 (2) SA 630 (T) 637H.

> the same, there is no question of the debtor and judgment creditor in any way acting fraudulently or dishonestly. The former presumably cannot avoid it; and the latter has or might have no option in order to obtain payment of its debt but to execute against the property. This being so, I fail to see how respondent's knowledge can avail the applicant."

In words echoing Nestadt J's reasoning in *Reynders v Rand Bank Bpk*,[155] Streicher JA stated that:

> "… [I]t does not follow that because an inference of fraud on the part of a second purchaser is drawn from the mere fact of knowledge of a prior sale that an inference of fraud likewise has to be drawn from such knowledge on the part of an execution creditor who attaches property which his debtor has sold in execution of a judgment. In terms of the common law such an execution creditor could, with some exceptions, attach the assets of which his debtor was the owner in order to obtain satisfaction of his debt. Effect is given to that right in s 36 of the Supreme Court Act 59 of 1959 read with Rule 45 of the Uniform Rules…."[156]

> "It follows that, unlike the purchase of a property with knowledge of a prior sale, the first respondent did what, according to the Uniform Rules, he was entitled to do. There can be no question of regarding his actions as a species of fraud. To extend the doctrine of notice to situations such as the present would open the door to unscrupulous debtors to fabricate personal rights, which would be difficult for a creditor to expose for what they are. It will discourage prospective purchasers from taking part in sales in execution where a claim to a prior personal right is made by a third party. Very few such prospective purchasers would be prepared to investigate the validity of such a claim by a third party and even less will be prepared to involve themselves in litigation against such a third party. In the result, to extend the doctrine

[155] In *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) 637H. See further FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 27; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[156] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 390C-D.

> of notice to situations such as the present will create, to the detriment of the creditor as well as the debtor, uncertainty as to the title obtained at a sale in execution and so reduce the effectiveness of such a sale, the purpose of which is to obtain satisfaction of a judgment debt."[157]

Streicher JA concluded that the doctrine of notice did not apply in this case and thus the knowledge on the part of the first respondent of the sale of the property to the appellant did not affect the validity of its subsequent attachment and sale-in-execution. Consequently, the judge held that the high court had correctly dismissed the appellant's application to set aside the attachment and sale-in-execution.[158]

In a minority dissenting judgment, Farlam JA held that the high court had erred in holding that the sale agreement in terms of which the appellant purchased the property from the third respondent (Costas) was not a *bona fide* sale, since its aim was to ensure that the family would not lose the use of the property. In Farlam JA's view, it is not arguable that the appellant acquiesced in the execution sale because the appellant did not apply to court to stop it before it took place. The appellant communicated its attitude to the first respondent's representatives before the sale-in-execution took place. Moreover, there is no basis for holding that the appellant's attitude had changed thereafter. Farlam JA further held that there was no basis for holding that the price at which the appellant bought the property was not an appropriate price when the contract on which the appellant relied was concluded.[159]

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[157] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 390I-391C.

[158] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 391D.

[159] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 391F-I.

It is noteworthy that the sale in execution took place pursuant to two writs of execution – the first in favour of Nedcor Bank Ltd, and the second in favour of Standard Bank. The latter creditor was not aware of the sale of the house to the appellant when it caused the issue of the writ of execution. Farlam JA indicated that there was no legal basis for setting aside the sale in execution or for ordering the second respondent, who bought the house in a sale in execution, to transfer the property to the appellant against payment of the purchase price set out in the agreement of sale between them and the costs of transfer. In terms of the minority dissenting judgment, the sale in execution was valid as it took place pursuant to the writ issued in favour of Standard Bank, and Standard Bank (the second respondent) was accordingly entitled to have the property transferred to it against payment of the price realised at the execution sale and the transfer costs.[160] Due to absence of knowledge of a prior personal right on the part of the second respondent, it subsequently acquired real right could not be set aside.

With regard to the preference[161] of the Supreme Court of Appeal as to the conflicting decisions in *Reynders v Rand Bank Bpk*[162] and *Hassam v Shaboodien*,[163] Farlam JA favoured *Hassam v Shaboodien*.[164] He pointed out that *Hassam v*

[160] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 391J-392B.

[161] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others Ltd* 2007 (4) SA 380 (SCA) 392C-D. See further FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 28.

[162] 1979 (2) SA 630 (T). See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 28.

[163] 1996 (2) SA 720 (C).

[164] 1996 (2) SA 720 (C). See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 28.

Shaboodien,[165] relying on *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*,[166] has shown that the basis for the judgment in *Reynders v Rand Bank Bpk*[167] is that the parties to the double-sale entered into a type of a fraudulent conspiracy, whereas there is no question of fraud or dishonesty in the case of a sale in execution.[168] Farlam JA pointed out that the requirement of fraudulent conspiracy was rejected in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*[169] as well as in *Hassam v Shaboodien*.[170] In other words, the main consideration – the presence of fraudulent conspiracy in a double-sale situation and absence of such in a sale in execution situation, which is the basis of the decision in *Reynders v Rand Bank Bpk*[171] – as shown to be incorrect.[172] The correct view is rather that because of the operation of the doctrine of notice, a limited real operation is granted to a personal right.[173] Farlam JA reasoned that the decision of the majority would deprive

[165] 1996 (2) SA 720 (C) 726J-727C.

[166] 1982 (3) SA 893 (A).

[167] 1979 (2) SA 630 (T).

[168] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 637F-H. CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[169] 1982 (3) SA 893 (A) 910G-H: "Dit blyk dus dat om van bedrog of *mala fides* binne die raamwerk van die kennisleer te praat - altans vir sover dit 'n verkoop in stryd met 'n voorkoopsreg aangaan - oorbodig is en moontlik verwarring kan skep. Die juiste siening na my mening is dat vanweë die kennisleer aan 'n persoonlike reg beperkte saaklike werking verleen word."

See *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 392G-J.

[170] 1996 (2) SA 720 (C) 726J-727C.

[171] 1979 (2) SA 630 (T).

[172] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 392I.

[173] T Naudé "The law of purchase and sale" 2007 *ASSAL* 1039-1054 1053; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

the holder of a prior personal right of its right of limited real operation.[174] Consequently, he granted the application for leave to appeal and upheld the appeal insofar as it is related to the first respondent.[175]

Naudé supports the majority judgment, but for a different reason. She submits that because the second purchaser bought the property, at the sale in execution without knowledge of any prior right, her real right cannot be contested by reference to the appellant's prior personal right. The appellant cannot obtain real operation against the second purchaser on the ground of sufficient publicity in the form of knowledge of the prior right.[176]

Brand's interpretation of the majority judgment is that, once an execution creditor has established a real right in a form of a judicial pledge through an attachment in execution of a judgment, the holder of a prior personal right cannot rely on the creditor's knowledge of that right at the time of attachment to set aside the real right acquired by the execution creditor. However, Brand is uncertain whether the statement by Streicher JA that it would be inappropriate "to extend the doctrine to situations such as the present" means that the doctrine would not apply to attachments in execution even if the attaching

[174] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 393F-G. See also T Naudé "The law of purchase and sale" 2007 *ASSAL* 1039-1054 1053; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215. FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 28.

[175] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 391F.

[176] T Naudé "The law of purchase and sale" 2007 *ASSAL* 1039-1054 1053.

creditor acted *mala fide*.[177] In this regard, he refers to the hypothetical case specifically left open in *Reynders v Rand Bank Bpk*,[178] where the judgment creditor and the judgment debtor fraudulently conspired to defeat a prior personal right of a third party by, for example, the fabrication of indebtedness.[179]

Regarding the impact of the majority judgment in *Dream Supreme* on other recognised applications of the doctrine of notice, Brand questions whether Streicher JA should be understood to subscribe to the views expressed in *Reynders v Rand Bank Bpk* that in double-sale situations the second purchaser's knowledge of the first sale is enough to set the doctrine of notice in motion, because that knowledge was sufficient to justify the inference of a fraudulent conspiracy between the seller and the second purchaser. According to Brand, the effect of this would mean, first, that the second purchaser would be able to avoid the operation of the doctrine of notice by rebutting the inference of fraud arising from its mere knowledge of the first sale, with evidence establishing *bona fides* on their part. Secondly, it would mean that, in principle, fraud is still a constituent element and therefore an essential requirement for the operation of the doctrine of notice. This would mean that *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others*[180] has overruled *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien*

[177] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 28.

[178] 1979 (2) SA 630 (T) 638E-F.

[179] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 28. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[180] 2007 (4) SA 380 (SCA).

(Pty) Ltd[181] by necessary implication. Brand suggests that one approach to resolve this conundrum would be to revert to the inquiry into the doctrinal basis of the doctrine of notice.[182]

The most recent case in which the Supreme Court of Appeal attempted to give content to the basis of the doctrine of notice is *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO*.[183] In this case, a developer, Casisles Coastal Property Investment CC ("Casisles"), secretly registered a sectional plan in conflict with the sale agreements of sectional owners in the scheme and thereby converted large parts of the common property into new sections.[184] Scharringhuisen transferred some of these sections to an associated company, Harbour's Edge Commercial Property Holdings ("Holdings"), which like Casisles, was under the control of Scharringhuisen.[185] The scheme was a mixed-use scheme comprising several residential and commercial units, but consisting mainly of units equipped as hotel suites to be operated as such through a rental pool agreement.[186] After discovering what had happened, a sectional owner applied for the appointment of a

[181] 1982 (3) SA 893 (A).

See *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) 392G-J.

[182] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30-31. See further CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[183] 2011 (4) SA 1 SCA.

[184] This case is also discussed in a section dealing with double sales in chapter 3.

[185] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 13H.

[186] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 4C-D.

curator ad litem for the scheme's body corporate on the basis that Scharringhuisen had perpetrated fraud on the sectional owners.[187]

The sequestration of Scharringhuisen's estate and liquidation of the two companies preceded the hearing of the proceedings under discussion.[188] Consequently, the liquidators of Holdings sold and transferred three of the new sections to the first appellant (Meridian Bay), and one to another company which later transferred the section to the first appellant.[189] Both Meridian Bay and the other company bought and accepted transfer of the sections with knowledge of the ongoing dispute regarding the sections, especially since a provision in the deed of sale described the nature of the dispute in some detail.[190]

The *curator ad litem* (Mitchell) approached the Western Cape High Court for an order that the disputed sections should revert to the body corporate as common property and for rectification of the sectional plan and sectional title deeds.[191] The high court granted the order. However, Meridian Bay and two banks with registered bonds over the disputed sections, appealed to the Supreme Court of Appeal.[192]

Before ruling on whether the doctrine of notice is available to the prior purchaser where first, the dispositive act of the seller has the effect of creating new objects of

[187] The recital of the facts and decision was gleaned from CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 215.

[188] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 1B.

[189] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 5A.

[190] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 5F-H.

[191] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 7A-E.

[192] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 4H-I.

ownership out of the property that is already a subject of a prior personal right, and second, insolvency intervenes,[193] the court discussed the doctrinal basis of the doctrine of notice. Ponnan JA pointed out that for many years South African courts sought to evoke *mala fides* or a species of fraud as an inherent justification for the doctrine of notice.[194] In the same vein as Van Heerden AJA in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*,[195] Ponnan JA argued that the reference to a species of fraud on the part of the acquirer with knowledge of a prior personal right in earlier cases, was nothing but a fiction to provide the doctrine of notice with theoretical support.[196]

Ponnan JA also acknowledged equity as a basis of the doctrine of notice.[197] Accordingly, he approved Scholtens's view that the question to be determined in a double-sale situation is whether the first purchaser would have been entitled to a decree of specific performance if the second contract had not been not concluded.[198] If the answer is in the affirmative, the first purchaser has an indefeasible right and should be entitled to the assistance of the court.[199] Indeed such question is normally asked in equity,

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[193] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 13I.

[194] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 8E-9E. In this regard, Ponnan JA referred to *De Jager v Sisana* 1930 AD 71 80, 84; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20A-E; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 20F.

[195] 1982 (3) SA 893 (A) 910-C.

[196] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 9E-F.

[197] See *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 8C, 16D. For this ground, he relied on RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182 180.

[198] JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34 31.

[199] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 17C-D. See also JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34 31; PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 124.

as a claim for specific performance is an equitable remedy. This also points towards the court's acceptance of equity as a basis for the doctrine of notice.[200]

Turning to Brand's proffered justification for the doctrine of notice, Ponnan JA stated that Brand's[201] "illuminating" theory,

> "will not only appreciably assist in shaping and determining the future debate on the subject, but also in resolving the various problematic anomalies and dogmatic classification puzzles."[202]

At same time, the court supported Brand's argument[203] that:

> "[W]e simply have to accept that the doctrine of notice is a doctrinal anomaly which does not fit neatly into the principles of either the law of delict or property law."[204]

The court did not indicate its preference regarding the doctrinal basis for the doctrine of notice. On the facts, Ponnan JA held that the doctrine of notice was available to the first purchasers. Scharringhuisen (through Casisles) unilaterally fraudulently reconfigured the common property into units in the scheme before disposing of it to Holdings, (which like Casisles) he controlled. The judge therefore held that there was no conceivable reason

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[200] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 124.

[201] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 31.

[202] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 10D.

[203] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30.

[204] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 10C. See also PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 124.

why the fraudulent restructuring of the common property into units should operate as a bar to prior purchasers invoking the doctrine. The first ground for the court's ruling was that no one is permitted to improve his or her own condition by his or her own wrongdoing. The second was that it would be in conflict with the maxim *nemo plus iuris ad alium transferre potest quam ipse haberet* for liquidators of the associates to acquire greater rights than the insolvent entity had.[205] The court concluded that Meridian Bay, well aware of the prior personal rights of the purchasers of the sections,[206] nonetheless chose to acquire the disputed sections with full knowledge that such acquisition was in conflict with the prior rights of the purchasers. The court held that such conduct was wrongful.[207] This also points to the court's acceptance of wrongfulness as requirement, in addition to knowledge, for the operation of the doctrine of notice.

Van der Merwe criticises the judgment in *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO*.[208] He submits that the repercussions of the "somewhat convoluted judgment" will only be fully realised at a later stage. Indeed, as Van der Merwe asserts, the most disconcerting aspect is that the court moved from one doctrinal basis to the other depending on which best suited the argument.[209] All that was necessary for the decision was to find that Scharringhuisen had actual knowledge of the prior personal rights of the sectional owners in terms of their contracts of sale based on the draft sectional plan when

[205] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 13I-E. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 217.

[206] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 14F.

[207] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 15B. See CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 217.

[208] 2011 (4) SA 1 SCA.

[209] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 217.

he acted to their detriment by registering a different sectional plan in terms of which the value of the undivided share in the common property of all unit owners was reduced on account of a large part of the common property being changed into sections.[210] Van der Merwe argues that this conclusion could have been reached on the authority of *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere,*[211] without any deviation with regard to the doctrinal basis of the doctrine.[212]

4 2 5 Remarks on judicial pronouncements

The discussion in the preceding sections focused on the courts' pronouncements on justifications for the operation of the doctrine of notice. The approach in section 4 2 1 was to look at some of the earliest reported case law with the aim of establishing how the operation of the doctrine of notice was justified after its reception in South African law.[213] The outcome is that the doctrine of notice was received into South African law by reference to a seventeenth century Roman-Dutch court decision and English Equity. Thus, the courts accepted fraud or *mala fides* supplemented by English equity principles as a basis for the doctrine of notice.

The approach in section 4 2 2 was to examine cases decided after the earliest cases but before 1979. In one of early cases, the then Supreme Court explained that if a subsequent acquirer of a real right accepted the transfer of a real right with knowledge that the property was promised to another person,

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[210] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 217.

[211] 1982 (3) SA 893 (A).

[212] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 217.

[213] See section 4.2.1 above.

> "it would be in the highest degree inequitable to allow him to defeat those rights by taking transfer which wholly ignore those rights."[214]

In another case, the Appellate Division explained the basis of the doctrine in the following manner: if the subsequent acquirer purchased the land with knowledge of the prior personal right to acquire a servitude,

> "it would therefore be a fraud on its part to accept and to enforce as against the defendant a clean title."[215]

This indicates the courts' acceptance of both fraud and equity as justifications for the doctrine of notice. From then forward, South African courts consistently advanced fraud, and in some cases English equity, as bases for the doctrine of notice.

The discussion in section 4 2 3 dealt with cases from 1979 onwards and illustrates that the application of the doctrine of notice in attachment and sale in execution situations has caused greater controversy as regards the justification and requirements for the operation of the doctrine of notice. The approach in *Reynders v Rand Bank Bpk*[216] is that the doctrine of notice does not apply in attachment and sale in execution cases because fraud, which is normally inferred from the subsequent acquirer's knowledge in double-sale situations, could not be drawn from the judgment creditor's knowledge as the latter is simply doing what the law has authorised him to do. However, in *Kazazis v Georghiades en Andere*,[217] a double-sale case, the court emphasised that fraud was not a requirement

[214] *Jansen v Fincham* (1892) 9 SC 289 293.

[215] *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280.

[216] 1979 (2) SA 630 (T).

[217] 1979 (3) SA 886 (T).

for the operation of the doctrine of notice as held in *Reynders v Rand Bank Bpk*,[218] but serves only as a doctrinal basis for the doctrine. The Appellate Division confirmed this view in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*.[219] The court in *Hassam v Shaboodien*[220] dealt with the application of the doctrine of notice in attachment and the sale in execution situation. It confirmed that *Reynders v Rand Bank Bpk*[221] was no longer good law in light of the decision in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*.[222]

The discussion in 4 2 4 focused on most recent cases. The majority judgment of the Supreme Court of Appeal in *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others*[223] appears to support the views expressed by Nestadt J in *Reynders v Rand Bank Bpk*.[224] More recently, in *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO*,[225] the Supreme Court of Appeal endorsed *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*.[226] It held that the reference to a species of fraud on the part of the subsequent acquirer of a real right with knowledge of a prior personal right in earlier cases, was merely a fiction to provide the doctrine of notice with

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[218] 1979 (2) SA 630 (T).

[219] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910-C.

[220] 1996 (2) SA 720 (C) 728D-J.

[221] 1978 (2) SA 630 (T).

[222] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A).

[223] 2007 (4) SA 380 (SCA).

[224] 1978 (2) SA 630 (T) 637H.

[225] 2011 (4) SA 1 SCA.

[226] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A).

theoretical support.[227] Nevertheless, the judge also accepted equity as the basis for the doctrine of notice and at the same time accepted that the doctrine of notice is an anomaly that does not fit neatly into the principles of either the law of delict or property law.[228] The court also explained that the acquisition of the disputed section with knowledge that such acquisition was in conflict with the prior rights of the purchasers, constituted *wrongful* conduct. The court thus acknowledged wrongfulness as a *requirement for the operation of the doctrine* of notice. Nevertheless, the court in *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO*[229] did not indicate its preference regarding the doctrinal basis for the doctrine of notice[230] and moved from one doctrinal basis to the other depending on which best suited the argument.[231] Although the application of the doctrine of notice in this case was correct, the Supreme Court of Appeal's attempt to justify the doctrine of notice by referring to various doctrinal bases appears to complicate the doctrinal issues rather than resolving them.

4 3 Doctrinal bases for doctrine of notice

The discussion by the courts' as to the justification for the doctrine of notice in the preceding section reveals that the reception of the doctrine of notice in South African law was not without challenges. In this section, I shall focus on academic views with regard to the basis for the operation of the doctrine of notice. Some of the academic views that

[227] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 9E-F.

[228] *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 10C.

[229] 2011 (4) SA 1 SCA.

[230] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 125.

[231] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 217.

formed part of the discussion of the courts' approach in the previous section, are repeated here because the academic views' presented in that section focused only on academic responses to particular cases.

Since the early 1930s, the doctrine of notice has been the subject of debate in South African academic literature. During this time, academics, in particular, McKerron,[232] Mulligan[233] and Scholtens,[234] debated the issue in terms of Roman-Dutch law sources and the relevant issues of principle and rationality. McKerron[235] and Exton Burchell[236] influenced by English law concepts, accepted that on a balance of equities first purchaser B could recover land transferred by A to second purchaser C, if C was aware of B's prior contractual right to transfer of the property to B. This emphasis on the application of discretion to rectify a perceived unfair outcome, suggests to Carey Miller, a context in which an appropriate dogmatic solution is considered illusive.[237] The argument that the double-sales solution is a concession to "equity" is problematic in terms of the distinction between real and personal rights. It seems, in Carey Miller's view, to miss the point of an

[232] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182.

[233] GA Mulligan "Double, double toil and trouble" (1954) 71 *SALJ* 169-169; JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34; GA Mulligan "Double sales: A rejoinder" (1953) 70 *SALJ* 299-307; GA Mulligan "Double sales and frustrated options" (1948) 65 *SALJ* 564-577.

[234] JE Scholtens "Difficiles nugae - once again double sales" (1954) 71 *SALJ* 71-86; JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34. See also D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98.

[235] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182.

[236] E Burchell "Successive sales" in Kahn E (ed) *Select South African legal problems: Essays in memory of McKerron RG* (1974) 91 *SALJ* 40-46.

[237] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 98. See further CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

act of defective acquisition, good only until reduced by judicial order following proof of the defect.[238]

In *Ingledew v Theodosiou*[239] the court emphasised the equitable discretion that applies when the *qui prior est tempore potior est iure* maxim is applied and declined to apply the doctrine of notice because, although the first sale was valid between the parties, it was indeed not a *bona fide* contract concluded at arm's length.[240] The court pointed out that the maxim *qui prior* differs from the rule of law with the result that the maxim had to be applied fairly by the consideration of the equities.[241] The court held that the policies underlying the maxim were the preservation of sanctity of contact and the consequent discouragement of sellers from engaging in activities that undermined that policy. Accordingly, the court applied these policies to the case at hand and gave effect to the second sale. It reasoned that the defendant's history of attempts to undermine the principle of sanctity of contract, justified a departure from the ordinary application of the maxim.[242] Indeed, this approach smacks of an English-law type choice between competing equities.[243]

The equity approach is more evident in a discussion of the principle by Burchell where he states,

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[238] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 114. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

[239] 2006 (5) SA 462 (W).

[240] *Ingledew v Theodosiou* 2006 (5) SA 462 (W) 54.

[241] *Ingledew v Theodosiou* 2006 (5) SA 462 (W) 62, 68.

[242] *Ingledew v Theodosiou* 2006 (5) SA 462 (W) 64.

[243] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

> "[h]owever, since C was *mala fide*, the equities in his favour would have to be strong indeed to defeat B's right."[244]

Burchell reviewed the academic debate in a contribution dedicated to memory of McKerron.[245] In this contribution, Burchell also tends to favour the English-law perspective in an argument levelled against Scholtens's analysis,[246] which limited B's right on the basis of whether specific performance was available to B. Burchell visualised that ultimately a consideration of the equities would be involved since specific performance is a discretionary remedy. It is, however, significant that this approach fails to acknowledge any inherent problem in a subsequent acquirer (C) obtaining an unimpeachable right notwithstanding knowledge of another's entitlement upon manifesting the intention to accept transfer.[247]

NJ van der Merwe argues that some of the situations covered by the doctrine of notice are instances of Aquilian delictual liability, constituted by interference with a contractual relation. According to this view, an acquisition of a thing promised to another with the knowledge on the part of the subsequent acquirer of a prior personal right, amounts to a wrongful and culpable infringement of that right and satisfies the basic

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[244] E Burchell "Successive sales" in E Kahn (ed) *Select South African legal problems: Essays in memory of RG Mckerron* (1974) 91 *SALJ* 40-46 46.

[245] E Burchell "Successive sales" in E Kahn E (ed) *Select South African legal problems: Essays in memory of RG Mckerron* (1974) 91 *SALJ* 40-46.

[246] JE Scholtens "Difficiles nugae - once again double sales" (1954) 71 *SALJ* 71-86; JE Scholtens "Double sales" (1953) 70 *SALJ* 22-34.

[247] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 114. See further CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

elements of delictual liability.[248] Van der Merwe indicates that the wrongfulness of the conduct of the second acquirer does not lie in the conclusion of a second contract in respect of a thing, but in the frustration of the prior claimant's right to receive performance when the successor obtains delivery.[249] In addition to the intentional infringement, Van der Merwe argues that a delict is committed where the infringement takes place negligently.[250] He asserts that the doctrine of notice was developed by the courts "bewustelik of onbewustelik" as to correct the false dogma that an obligation has no effect against third parties, and that personal rights have relative operation only.[251]

Response in legal academic discourse to Van der Merwe's theory has been mixed, and in the main unfavorable. Cooper supports Van der Merwe's delictual theory. He argues that the conduct of the subsequent acquirer of a real right with knowledge of a prior personal right is not fraud as fraud requires a fraudulent misrepresentation on which a person (the victim) acts to his or her detriment. A purchaser who takes transfer knowing of an earlier sale of the property, does not in doing so make any representation to the first

[248] NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 157.

[249] NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 157 174.

[250] See NJ van der Merwe *Die beskerming van vorderingsregte teen aantasting deur derdes* (1959) 171; NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 157; NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 278. See further GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 259.

[251] NJ van der Merwe *die Beskerming van vorderingsregte teen aantasting deur derdes* (1959) 171; NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 173. See also GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 259.

purchaser; nor does the transfer of property to the second purchaser cause the first purchaser to act to his or her detriment. Cooper argues that by accepting the transfer, the second purchaser assists the seller to commit a breach of the first contract; thereby the second purchaser commits a delict, namely inducement of breach of contract. Cooper argues that by parity of reasoning, a purchaser who accepts transfer of property with knowledge that the seller has leased the property, but refuses to recognise the lease, assists the seller to commit a breach of contract; and thereby the purchaser commits the same delict as the second purchaser in the analogous situation in double sales.[252]

Lubbe criticises Van der Merwe's theory set out above. He argues that it is complex and has over the years undergone permutations.[253] Initially, the existence of an independent and distinct doctrine of notice separate from situations entailing a delict, is conceded in respect of some decisions involving unregistered servitude agreements. Lubbe argues that apart from the puzzling statement that these cases involved "'n besondere verpligting wat op agtereenvolgende persone rus", no attempt was made to explain the 'special obligation' in detail.[254] This 'ander sogenaamde kennisleer", according to Lubbe, plays an ever diminishing role in Van der Merwe's later discussion of the basis

[252] WE Cooper *Landlord and tenant* (2nd ed 1994) 287. GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 250 states that it not surprising that the courts should, in the face of this onslaught, have retreated from their classification of the doctrine of notice as a species of fraud.

[253] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 259.

[254] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 259.

of the doctrine of notice.[255] Lubbe indicates that in the textbook by Van der Merwe and Olivier,[256] the delictual explanation is rampant, and used to generate answers to outstanding issues, avowedly *de lege ferenda*, but with considerable dogmatic conviction.[257]

Carey Miller argues that the difficulty that South African law has in explaining and justifying these principles, and the consequent attitude that the operation of the doctrine of notice is anomalous, is the result of flawed reasoning. Such reasoning fails to start from the correct point or, more particularly, fails to recognise the parties' act of will as the foundational aspect in any process of derivative acquisition.[258] He suggests that in a double-sale scenario the second transferee's (C's) acquisition is *ex facie* good because the essential requirements of policy (delivery or registration) will have been complied with, but the latent pre-requisite of intention by reason of knowledge of the prior entitlement of the another (B) to the thing concerned, is flawed. C's acquisition is good until the act of transfer is rendered voidable by B on the basis of C's knowledge of B's prior entitlement. The double-sale scenario is, according to Carey Miller, closely related to other instances of defective acquisition – eg, a transferor whose intention to transfer is secured by the

[255] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 259.

[256] NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 269-273.

[257] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 259.

[258] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 97.

transferee's fraudulent inducement giving a subsistent real right but one open to reduction on proof of the acquirer's bad faith.[259]

In the essay in honour of CG van der Merwe, which mainly focuses on the elements of the doctrine of notice, Brand criticises NJ van der Merwe and Olivier's theory which suggests that the doctrine has its roots in Aquilian delictual liability and that negligence on the part of the acquirer of the real right should consequently also be sufficient for the operation of the doctrine of notice.[260] The delictual theory developed by Van der Merwe and Olivier, according to Brand, raises several difficulties. The first is that the authors[261] themselves acknowledge that specific performance, which the doctrine effectively affords, is not recognised as a remedy under the *actio legis Aquiliae*. However, Van der Merwe and Olivier suggest that this problem can be overcome by developing South African law of delict to provide for this type of relief. Brand argues that if we change the elements of Aquilian liability in so fundamental a way to accommodate the doctrine of notice, Aquilian liability cannot be regarded as its doctrinal basis.[262] The second difficulty is that the delictual theory is irreconcilable with the elements of the doctrine of notice as formulated

[259] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 113-114. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

[260] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30.

[261] NJ van der Merwe & PJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (6th ed 1989) 278; NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 157 174.

[262] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30.

over the years by our courts, which do not accept that the negligent infringement of a prior personal right affects the subsequently acquired real right.[263]

In an attempt to provide a solution to the conundrum of the basis of the doctrine of notice, Van der Vyver proposes the redefinition of the boundary between property and contract law. As a result, the "term relative real right" is coined to distinguish between real rights that exist *inter partes* only, and those operative against successors in title and the holders of subsequent, inconsistent, limited real rights (*jura in re aliena*).[264] From this premise, Van der Vyver argues that the first purchaser (B) acquires a relative real right (or personal right with real operation) enforceable against the second purchaser (C) even before registration. The only function of registration, according to Van der Vyver, is to ensure that the real right (servitude) will remain in force if the property is alienated to a third party, and that it will enjoy a preference over all limited real rights subsequently established in respect of the thing.[265] Arguably, Van der Vyver's theory suffers from the same shortcoming as the delictual theory – it is incompatible with South African case law.[266] It falls short in explaining the principle laid down in *Grant & Another v Stonestreet*

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[263] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 25, 30.

[264] JD van der Vyver "The doctrine of private-law rights" in SA Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201-246 238-239. See GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 259-260.

[265] JD van der Vyver "The doctrine of private-law rights" in SA Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201-246 239. See also See GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 260.

[266] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 30; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216. See *Cusson v Kroon* 2001 (4) SA 833 (SCA) 840H-I.

& Others[267] that the fact that an unregistered servitude cannot be enforced against an innocent purchaser does not prevent its enforcement against the subsequent purchaser with notice of the servitude who acquired the servient property from the intervening innocent purchaser.[268]

Brand's theory is that one has to accept that the doctrine of notice is a doctrinal anomaly that does not fit neatly into the principles of either the law of property or the law of delict, that legal development is not always logical, and that specific remedies sometimes evolve to deal with the exigencies of specific situations.[269] Accordingly, Brand suggests that the answer to the conundrum in the double-sale situation does not lie in the search for a doctrinal basis for the doctrine, but in the fact that the infringement of the personal right by an acquirer of the real right is perceived as wrongful conduct.[270] Brand's premise is that, although the doctrine of notice is not founded in delict, it shares a common element with the delictual liability: wrongfulness (unlawfulness). In determining wrongfulness for the purposes of the doctrine of notice, Brand argues that we should be guided by principles that have crystallised in delictual parlance. In this regard the principles of the law of delict proceed from the premise that the conduct that manifests itself as a positive act causing physical damage to the property or person of another, is

[267] 1968 (4) SA 1 (A) 24B-C.

[268] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 261.

[269] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216. See further CG van der Merwe *Sakereg* (2nd ed 1989) 63.

[270] This view has also been expressed by PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 87. See also *Cusson v Kroon* 2001 (4) SA 833 (SCA).

prima facie wrongful. By contrast, causation of pure economic loss is not regarded as *prima facie* wrongful. Its wrongfulness, according to Brand, depends on the existence of a legal duty.[271] In applying these principles, the doctrine of notice appears to fit naturally into the category of pure economic loss. The imposition of a legal duty is a matter of judicial determination by employing the criteria of public and legal policy.[272] In the context of the doctrine of notice this would mean, according to Brand, that an infringement of a prior personal right through the acquisition of a real right will be recognised as "wrongful" only if, for reasons of public and legal policy, the courts determine that such infringement should attract the consequences of the doctrine.[273]

It is from this vantage point, according to Brand, that the questions arising from the judgments in *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others*[274] can be accommodated. Brand suggests that the majority judgment by Streicher JA is based on the premise that for reasons of public and legal policy, an attachment in execution is not wrongful in the context of the doctrine of notice merely because the creditor who caused

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[271] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 31. See further *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) 12; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 SCA 14.

[272] *Administrateur, Natal v Trust Bank van Afrika BPK* 1979 (3) SA 824 (A) 833A; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 SCA 14. See further FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 31.

[273] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 31-32. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

[274] 2007 (4) SA 380 (SCA).

the attachment and execution sale had knowledge of an earlier prior personal right.[275] Moreover, the considerations of legal and public policy that led Streicher JA to the conclusion of wrongfulness,[276] relate to the specific nature and purpose of an execution sale and the particular consideration that the purchaser at an execution sale should as far as possible acquire a secure title.[277]

Although Streicher JA did not decide that *mala fides* or fraud on the part of the attaching creditor would render an attachment wrongful, Brand strongly suggests that such conduct should have that effect. Furthermore, Brand ventures to suggest that any intimation in the judgment of Streicher JA that the doctrine of notice does not extend to attachments and sales in execution at all – whether *mala fide* or fraudulent – should be regarded as *obiter*.[278] However, Brand suggests that the majority decision has no impact on the requirement of knowledge in the application of the doctrine of notice outside of the attachment and sale-in-execution scenarios. Accordingly, *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* [279] remains the beacon of authority. The effect of this is that *mala fides* or fraud on the part of the acquirer of the real right is not required, and that mere knowledge of the existing personal right on the

[275] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32.

[276] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA).

[277] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

[278] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32.

[279] 1982 (3) SA 893 (A).

part of the acquirer of the real right is sufficient to render the acquisition wrongful.[280] The fact that the second respondent in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* [281] thought it was entitled to infringe the appellant's personal right of pre-emption – and that the high court agreed with this impression – is of no consequence. The second respondent's knowledge of the appellant's personal right rendered its acquisition of the shares wrongful. Brand further argues that outside the ambit of attachments and sales in execution, the concept of fraud or *mala fides* is not only a matter of inference, as suggested by Nestadt J *Reynders v Rand Bank Bpk*,[282] but not an element of the doctrine at all.[283]

CG van der Merwe[284] submits that it was not necessary for Brand to use the ground on which the claim of the holder of a prior personal right was confirmed in *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others*[285] to establish that the doctrine of notice is based on breach of a legal duty on the part of the second purchaser in a double-sale scenario. In Van der Merwe's view the decision in *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others*[286] was simply based on provisions of the Rules of Court, which for reasons of public policy, protect the security of the execution creditor against any challenge. It was unnecessary to drag the doctrine of notice into the dispute

[280] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32.

[281] 1982 (3) SA 893 (A).

[282] 1979 (2) SA 630 (T).

[283] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32.

[284] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

[285] 2007 (4) SA 380 (SCA).

[286] 2007 (4) SA 380 (SCA).

and consequently formulate a delictual theory for the existence of the doctrine around the public policy reasons proffered for the protection of the judicial pledge execution creditor. Van der Merwe points out that Brand does not apply this theory to the ordinary double-sales situations, but states expressly that the requirement of actual knowledge (or *dolus eventualis*) with regard to the prior personal right still reigns supreme. Brand does not provide an explanation of why the second purchaser's knowledge of the prior personal right is branded as "wrongful."[287]

4 4 Conclusion

In light of the analysis of the justifications for the operation of the doctrine of notice in this chapter, it is apparent that the operation of the doctrine – in early case law after reception of the doctrine of notice[288] – was justified by reference to seventeenth century Roman-Dutch decision by Loenius,[289] and to English equity.[290] Thus, South African courts accepted *mala fides* or "a species of fraud" and English equitable principles as inherent justifications for the doctrine of notice.[291]

In other case law decided before 1979,[292] South African courts attempted to give more content to the theory that the fraudulent behaviour on the part of the subsequent acquirer of a real right with knowledge of the prior personal right was the basis for the

[287] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

[288] See section 4.2.1.

[289] Loenius *Decisien en Observatien* 80.

[290] *Le Neve v Le Neve* (Tudor's L.C. Eq. vol ii. 32).

[291] See *Jansen v Pienaar* (1881) 1 SC 276; *Saayman v Le Grange* (1879) 9 Buch 10 12; *Richards v Nash and Another* (1881) 1 SC 312 316; *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 46.

[292] See section 4.2.2.

doctrine of notice.[293] Thus, it was held that it was unnecessary to prove fraud in the ordinary sense in the operation of the doctrine of notice.[294] Furthermore, the then Appellate Division explained that the basis for the operation of the doctrine in cases of knowledge on the part of the subsequent acquirer, is that the latter is, in reality, attempting to repudiate the burden on land by continuing with the transaction. Since the law refuses to countenance any such attempted repudiation, the second purchaser is deemed to act *mala fide* and is guilty of a "species of fraud".[295] In some cases, the courts supplemented the fraud explanation with the English equitable principles as a possible justification for the doctrine of notice.[296] Therefore, leaving it to judges to decide on the balance of equities which party's conduct was more inequitable in the circumstances.

It is also evident from this chapter that the uncertainties surrounding whether or not the doctrine of notice applies in attachment and sale-in-execution situations appears to exacerbate the controversy regarding the true basis of the doctrine of notice.[297] The

[293] See *Jansen v Fincham* (1892) 9 SC 289 293-294; *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280; *Nott v Liquidator of the Breyten Estates Ltd* 1916 TPD 375 376; *Ridler v Gartner* 1920 TPD 249 260; *McGregor v Jordaan* 1921 CPD 301 308; *De Jager v Sisana* 1930 AD 71 84; *Manganese Corporation Ltd v South Africa Manganese Ltd* 1964 (2) SA 185 (W) 193D; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20A-F; *Tiger-Eye Investments (Pty) Ltd and Another v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C) 358F-G.

[294] *Manganese Corporation Ltd v South Africa Manganese Ltd* 1964 (2) SA 185 (W) 193D.

[295] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20A-F.

[296] For recent case law, see *Ingledew v Theodosiou* 2006 (5) SA 462 (W) 54.

[297] See section 4.2.3. In *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 636-634, the court pointed out that the doctrine of notice could not defeat the creditor's rights because there is no fraudulent consipiracy present if the property is attached in the process of enforcing an execution order. But see *Hassam v Shaboodien and Others* 1996 (2) SA 720 (C) 728D-J, where the judgment in *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T) 636-634 was rejected. The court held that the doctrine of notice is applicable against

analysis of the two decisions of the Transvaal Provincial Division indicates that the even though fraud was accepted and consistently advanced as a justification for the operation of the doctrine, there are situations – eg, attachment and sale in execution – where the fraud explanation appears unsatisfactory.[298] Moreover, in a fascinating decision by the then Appellate Division, which was intended to settle the controversy as to whether or not the doctrine applies in sale-in-execution cases, the court emphasised that any reference to *mala fides* or fraud in the earlier cases was nothing but a fiction to provide the doctrine of notice with theoretical support.[299]

It is arguable that the reasons usually advanced by the courts for and against extending the operation of the doctrine of notice to attachment and sale-in-execution situations are fallacious,[300] considering the origin and nature of the rights acquired through attachment and sale in execution. Thus, a real security right acquired by judicial order does not require the consent of the previous owner of the property because its acquisition is original as opposed to derivative acquisition, where such consent is necessary. Furthermore, the doctrine of notice does not apply to real rights acquired by original acquisition. In *Cillie v Geldenhuys*,[301] the Supreme Court of Appeal pointed out that the owner's attempted defence of lack of knowledge of the claimant's possession, was misplaced because the doctrine of notice does not apply in the context of acquisitive

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the judgment creditor with knowledge of a prior personal right on the property. See also R Brits *Real security law* (2016) 480-481.

[298] *Reynders v Rand Bank Bpk* 1979 (2) SA 630 (T); *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T).

[299] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910-C.

[300] See section 4.2.3.

[301] *Cillie v Geldenhuys* 2009 (2) SA 325 SCA.

prescription. The doctrine of notice constitutes an exception to the protection afforded third parties without knowledge of an agreement that creates a personal right over their land. However, acquisitive prescription results in original as opposed to derivative acquisition of real rights and the doctrine therefore finds no application.[302] Original acquisition of real rights through prescription (or any other original mode of acquisition) vests the rights in the new owner without registration, and irrespective of whether the previous owner or anybody else was aware of the process or consented to it. Van der Walt argues that this brief but authoritative passage in *Cillie v Geldenhuys* should put an end to lack-of-knowledge defences in acquisitive prescription cases.[303] In view of *Cillie v Geldenhuys,* it is clear that the application of doctrine of notice should not extend to attachment and sale-in-execution situations because they bring about original acquisition of real rights.

What is more, an analysis of the most recent Supreme Court of Appeal judgments indicates that South African courts have not only settled with the fraud and English law equitable doctrine as a possible explanation for the doctrine of notice, but also adopted the view that the doctrine of notice is an anomaly, which does not fit neatly into the principles of either the law of delict or property law.[304] It is arguable that the Supreme Court of Appeal's attempt to justify the doctrine of notice by referring to various doctrinal bases complicates the doctrinal issues rather than resolving them.

[302] *Cillie v Geldenhuys* 2009 (2) SA 325 SCA 13.

[303] AJ van der Walt *The law of servitudes* (2016) 300.

[304] See *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011 (4) SA 1 SCA 10C.

The discussion of the academic literature[305] indicates that the justifications for the operation of the doctrine of notice by South African courts' are not fully supported in academic circles. As a result, several theories have been put forward in an attempt to explain the doctrinal bases for the doctrine of notice. One of the theories suggests that the situation in which the doctrine of notice applies are instances of Aquilian delictual liability and as such should rather be dealt with under the law of delict.[306] Another view suggests the redefinition of the boundary between property and contract law, in an attempt to accommodate the doctrine of notice.[307] More fascinating is the theory that explains the doctrine in terms of the acquisition of real rights by means of derivative acquisition.[308]

In conclusion, it is apparent from this chapter and from chapter three, that from the outset the doctrine of notice has presented a challenge to South African lawyers because of its non-conformity to some private-law principles – in particular, the distinction between limited real rights and personal rights involving use of land. The discussion of case law in this chapter – from the period of the reception of the doctrine until today – shows that

[305] See section 4.3 above.

[306] NJ van der Merwe "Die aard en grondslag van die sogenaamde kennisleer in die Suid-Afrikaanse privaatreg" (1962) 25 *THRHR* 155-180 157. For a similar view see WE Cooper *Landlord and tenant* (2nd ed 1994) 287. For contrary view, see GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 259.

[307] JD van der Vyver "The doctrine of private-law rights" in SA Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201-246 239.

[308] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 97 & 113-114. See also GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 248-249.

there is no certainty regarding the basis of the doctrine of notice in case law. Although most of the theories raised in academic literature are in direct conflict with the law as explained by the courts, there are, however, some plausible explanations in academic literature that might assist in resolving the controversy surrounding the basis of the doctrine of notice.

The aim of this chapter was to describe and analyse the foundations of the common-law doctrine of notice. More specifically, the goal was to analyse case law and academic literature with the aim of establishing and understanding the reason(s) for granting a prior personal right immunity against a subsequently acquired real right.

Chapter 5

Conclusion

5 1 Introduction

In this chapter, I recap the basic characteristics of the doctrine of notice by restating the two most common instances in which the doctrine operates. I then summarise the requirements of the doctrine of notice. This is followed by conclusions regarding the controversies surrounding the type of notice (knowledge) required for the doctrine to operate, and at what stage of transfer; whether the doctrine operates only where the prior personal right acquired by the first purchaser (first grantee) is a *ius in personam ad rem acquirendam*; and the closely-related controversy regarding the scope of operation of the doctrine. In the next part of the chapter, I draw conclusions about the doctrinal problems raised by the doctrine and present a critical assessment of the various dogmatic bases advanced for the doctrine. In the final part of the chapter, I consider a difficult question of whether it is necessary to conclude that the first purchaser (first grantee) acquires something akin to a real right to force the second purchaser (second grantee) to give effect to his or her personal right *ad rem acquirendam*. In this chapter, I shall draw largely on the insights gained from an examination of the two most recent comparative contributions on the doctrine of notice.[1]

[1] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128; NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC

5 2 Basic characteristics

The basic characteristics of the doctrine of notice are best illustrated in the instances of double and successive sale transactions. The typical scenario is where the seller (S) sells land or a motor vehicle to a purchaser (P1) and then subsequently sells the same motor vehicle or land to a second purchaser (P2), usually at a much higher price. The seller then effects transfer to the second purchaser by delivering the motor vehicle or by registering the land in his or her name in the deeds office. The second purchaser (P2) knows that the seller has previously concluded a contract of sale for the motor vehicle or the land with the first purchaser (P1). Initially, the first purchaser was entitled to claim from the seller (S) that the transfer (registration) in the name of the second purchaser (P2) be set aside and transfer (registration) be effected in his or her (P1's) name. Later, the first purchaser (P1) was entitled to compel the second purchaser (P2) to cooperate in setting aside the transfer of the motor vehicle to P2's name or the deregistration of his or her title (P2's) and to allow transfer (registration) of ownership in the name of the first purchaser (P1). If transfer (registration) in the name of the second purchaser had not yet taken place, the first purchaser (P1) would, in addition, be entitled to a court interdict to prevent the seller (S) from giving transfer (registration in the deeds office) to the second purchaser (P2).

An equally well-known illustration of the doctrine of notice is where the grantor grants an unregistered limited real right (servitude or long-term lease) to the first grantee and thereafter sells and transfers the land to the second grantee by registration of the

Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189.

land in the name of the second grantee. The second grantee is aware of the unregistered limited real right concluded at the contractual stage between the grantor and the first grantee. In such a case the first grantee is, in terms of the doctrine of notice, entitled to compel the second grantee to cooperate in the registration of the limited real right in the land in the deed office, and thus to allow registration of the ownership in the land to be encumbered by the limited real right (servitude or long-term lease) in favour of the first grantee. Prior to the registration of unencumbered ownership in the name of the second grantee, the first grantee would, in addition, be entitled to a court interdict to prevent the grantor and second grantee from registering the land unencumbered by the limited real right of the first grantee. Therefore, whatever the scope of the scenario, the effect of the doctrine of notice remains the same.

5 3 Summary of the requirements of the doctrine of notice

In summary, the doctrine of notice operates:

(1) when a prior personal right aimed at acquisition of a real right exists;

(2) where the holder of a subsequent real right was actually aware of or foresaw the possibility of the existence of prior personal right and concluded the transaction regardless;

(3) where the holder of the real right nonetheless infringed upon the prior personal right by obtaining transfer or registration of the real right.[2]

[2] PJ Badenhorst “The South African doctrine of notice: A comparative law perspective” (2015) 5 *Prop LR* 119-128 128 relying on *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T) 894B-C.

5 4 What kind of knowledge is required on the part of the second purchaser (second grantee) and at what stage?

For the holder of the prior personal right (P1) to institute an action, he or she must comply with the requirements of the doctrine of notice. Initially the doctrine required actual (and not constructive) knowledge of the prior personal right, and fraud, later watered down to *mala fides*, on the part of the transferee of ownership (the second purchaser (P2)) or the second grantee of limited real right). Later it was accepted that whenever the second purchaser or grantee was aware of the prior personal right, he or she was deemed to have acted *mala fide*.

The actual knowledge required was later watered down to *dolus eventualis* on the part of the second purchaser meaning that despite yellow lights flashing, the second purchaser accepted transfer of the property. In practice, *dolus eventualis* occurred in cases dealing with land subject to an unregistered servitude being sold to a further purchaser, and the latter grantee being aware that the holder of the unregistered servitude had already started to exercise his or her servitudinal rights with regard to the property. Although the second acquirer of the land would not have actual knowledge of the servitude, the yellow lights would start flashing when he or she observed that the holder of the unregistered servitude was on the land purporting to exercise his or her servitudinal rights.[3]

[3] *Erasmus v Du Toit* 1910 TPD 1049; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20E-F. For recent case law see *Meridian Bay Restaurant v Mitchell* (686/09) [2011] ZASCA 30 (23 March 2011) 27, where Ponnan JA confirmed that the only requirement for the operation of the doctrine of notice is "actual knowledge (or perhaps *dolus eventualis*) of the prior personal right of the first purchaser on the part of the second purchaser (the acquirer)."

Furthermore, it was later accepted that the knowledge of the prior right need not have existed at the moment when the second purchaser entered into the contract with the seller, but could exist at any time before transfer or registration in the name of the second or subsequent purchaser took place. This is best illustrated by knowledge on the part of successive purchasers, for instance, where the second purchaser had no knowledge of the prior personal right of the first purchaser, but the third successive purchaser was in fact aware of the prior personal right *ad rem adquirendam* of the first purchaser.[4]

5 5 Should the application of the doctrine of notice be restricted to the acquisition of personal rights *ad rem acquirendam* by the prior purchaser (prior grantee) or should its application be extended to the acquisition of personal rights of a purely personal nature?

The doctrine has been found to apply in situations beyond the classic double-sales and successive sales, unregistered servitudes, and unregistered long-term lease scenarios. Of these alternatives, debate centers in the main on options to purchase, personal rights of pre-emption, and sales subject to approval by a third person. An option to purchase requires the seller to give the agreed party an “option to purchase the house in advance of resale to a third party”, whilst the similar right of pre-emption confers a “right to buy

[4] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 24B-C. D Carey Miller “A centenary offering: The double sale dilemma – Time to be laid to rest?” in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 109.

back property at a time when the current owner comes to sell".[5] A controversy exists as to whether in order for the doctrine to operate, the prior right of the first purchaser must be a personal right which is capable of being made real – ie, a *ius in personam ad rem acquirendam*. We have seen that the majority of South African case law and academic literature accepts that the doctrine of notice applies only in the case of *iura ad rem acquirendam*.[6] However, we have also seen that a number of South African cases and South African academic literature suggests that the doctrine should be extended to prior options and rights of pre-emption,[7] or even to personal rights of a purely personal nature.[8]

The main argument against the inclusion of an unexercised option and an unexercised right of pre-emption is that it is one-stage removed from the standard position, being only an option to get into the classic position of the first purchaser or first grantee. Because these unexercised rights are two stages removed from a real right, they do not fit into the standard paradigm.[9]

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[5] NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 179-185.

[6] For case law, see *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280; *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 24A-B; *Low Water Properties (Pty) Ltd v Wahloo Sand CC* 1999 (1) SA 655 (SE) 663C; *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) SA 784 (T). For academic literature, see AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 231.

[7] *Vansa Vanadium SA Ltd v Registrar of Deeds* 1997 (2) SA 784 (T) 797E-F; *Spearhead Property Holdings Ltd v E and D Motors (Pty) Ltd* 2009 (4) All SA 417 (SCA) 53.

[8] *Cussons v Kroon* 2002 (1) All SA 361 (A); *De Villiers v Potgieter NO* 2007 (2) SA 311 (SCA) 1-8.

[9] NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 181.

I take sides with Nikola Tait who argues that there are strong reasons, both in policy and in principle, for maintaining the standard paradigm and thereby not including unexercised options and rights of pre-emption within the scope of application of the doctrine of notice. From an overarching perspective, there is the desire to maintain certainty and clarity in the South African system of property law. In the event that the scope is too wide or too loosely defined, this will contradict these policy goals and result only in commercial uncertainty.[10] Tait continues that this ambiguity as to scope attracts a great deal of criticism of the doctrine as a whole, thereby corrupting what could otherwise be a sophisticated and valuable mechanism. Maintaining the standard requirement would provide much-needed structure to the doctrine and allow it to harmonise with a property system based on clear requirements.[11] She points out that a personal right capable of being made real, is tied up with the fundamentals of the two-stage derivative acquisition model. The holders of such a right are operating within this domain; they are involved in the transfer process – even if at that moment they are only at the preliminary contractual stage. By contrast, the holders of rights not capable of being made real, that are purely personal, are not part of this process. Yet it is that very transfer model which defines the doctrine's scope and is at the core of its conceptual basis. It is questionable whether the holder of an unexercised option or right of pre-emption should benefit from a doctrine tethered so intricately in this system, when they are themselves operating outside of the

[10] NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 181.

[11] NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 182.

system. Furthermore, one should bear in mind that the strict application of the two-stage mechanism and its inherent limitations, could penalise the option holder or the holder of the right of pre-emption for bad faith arising only moments before registration. It is unjustifiable that the option holder or the holder of a right of pre-emption should participate in the transfer process, and even be potentially subject to a harsh penalty because of that system, and then be subjected to a claim from someone who is entirely uninvolved in that process. Accordingly, the doctrine of notice should find no application in cases relating to an unexercised option and an unexercised right of pre-emption.

5 6 The scope of the doctrine of notice

It is clear from chapter 3 that most South African case law and academic literature accepts that the doctrine of notice should operate only in the case where the first purchaser or first grantee acquires a personal right that is capable of being made real and thus gives rise to the acquisition of real rights (*iura in personam ad rem acquirendam*).[12] Therefore, the scenarios in which the doctrine of notice operates are in double and successive sale transactions,[13] in transfers of ownership of land by the grantor to a second grantee of land burdened with an unregistered servitude;[14] or in unregistered long-term leases[15] or an unregistered mortgage in favour of the first grantee.[16] However, we have seen that in practice the doctrine has also extended to knowledge of prior options, rights of pre-

[12] See chapter 3, section 3.4.2.

[13] See chapter 3, section 3.3.2.

[14] See chapter 3, section 3.3.5.

[15] See chapter 3, section 3.3.6.

[16] See chapter 3, section 3.3.4.

emption, the transfer of land subject to the approval of a third person, and even to knowledge of rights purely personal in nature.[17] Most recently, an attempt has been made to extend the operation of the doctrine to the scenario where land subject to a prior personal right was sold in execution in a forced sale.[18]

My conclusion is that the doctrine should be restricted to the classic scenarios of *iura in personam ad rem adquirendam* acquired by the prior purchaser or grantee of certain limited real rights, and should not be extended to options, rights of pre-emption, and sales subject to approval by a third person or other rights purely personal in nature. The main argument against including an unexercised option and an unexercised right of pre-emption within the scope of application of the doctrine, is that it is one step removed from the standard position, being only an option to get into the classic position of the first purchaser or grantee. Because these unexercised rights are two stages back from being transformed into a real right, they do not fit within the standard paradigm. Although the second purchaser also participates in the *mala fides* of the seller or grantor, the inclusion of these scenarios within the scope of operation of the doctrine would cause uncertainty in the classic two-step derivative transfer process.[19]

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[17] See chapter 3, section 3.3.3 for an analysis of case law concerning the extension of the doctrine of notice to personal rights other than personal rights to acquire a real right. See also NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189179-185.

[18] See chapter 3, section 3.3.7 for discussion of cases of this nature.

[19] See also NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 181. AJ van der Walt & S Maass "The enforceability of tenants' rights (part 2)" 2012 *TSAR* 228-246 229-231 contend that the extension of the doctrine of notice to pure personal rights may lead to

The controversy as to whether the scope of the doctrine of notice also covers the scenario where land, which to the knowledge of the execution creditor, is subject to a prior personal right when it is sold in execution in a forced sale, is complex.[20]

The main argument in case law[21] and academic literature[22] for and against extension of the application of the doctrine of notice to sale in execution, boils down to the following: an inference of fraud (or later *mala fides*) should not, as in the case of double sales, be drawn from the prior knowledge of the prior personal right on the part of an execution creditor who attaches property of the debtor to be sold in execution. Unlike a second purchaser with knowledge of a prior sale, a judgment creditor who causes property to be sold in execution is merely exercising its right to do so in terms of section 36 of the Supreme Court Act 59 of 1959 and the Uniform Rules of Court.[23] The knowledge of the execution creditor could never be regarded as a species of fraud or *mala fides*.[24] To hold otherwise would create the danger of unscrupulous debtors fabricating personal rights, which would be difficult for the creditor to expose for what they are. It will also

great uncertainty regarding the enforceability of these rights, since one of the basic nature of a purely personal right is that it is not enforceable against third parties. In this regard see chapter 3, section 3.3.3.

[20] See R Brits *Real security law* (2016) 480-481.

[21] *Reynders v Rand Bank Bpk* 1978 (2) SA 630 637F-638A; *Dream Supreme Properties 11CC v Nedcor Bank Ltd* 2007 (4) SA 380 (SCA) paras 24, 26. See further *Hassam v Shaboodien* 1996 (2) SA 720 (C) 728D-J.

[22] T Naudé "The law of purchase and sale" 2007 *ASSAL* 1039-1054 1054; FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21.

[23] *Dream Supreme Properties 11CC v Nedcor Bank Ltd* 2007 (4) SA 380 (SCA) paras 24, 26.

[24] *Reynders v Rand Bank Bpk* 1978 (2) SA 630 637H.

reduce the effectiveness of a sale in execution and discourage prospective purchasers from taking part in it.[25]

This explanation loses sight of the fact that in the acquisition of ownership by a purchaser at a sale in execution, the purchaser acquires the land by an original mode of acquisition of property. His or her acquisition of ownership is independent of the cooperation of the predecessor in title, and there is no question of passing ownership from a predecessor in title to the eventual acquirer. The fact that a judicial sale in execution is sanctioned by the state, invests the acquirer with a protected original title which is immune to excussion by a person with an alleged stronger right.[26] The fact that we are here dealing with an original mode of acquisition of property is sufficient to conclude that the scenario of sales in execution cannot invoke the doctrine of notice to

[25] *Dream Supreme Properties 11CC v Nedcor Bank Ltd* 2007 (4) SA 380 (SCA) para 26. See also T Naudé "The law of purchase and sale" 2007 *ASSAL* 1039-1054 1054.

[26] See JC Sonnekus "Sub hasta-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *TSAR* 696-727 697: "By oorspronklike wyses van eiendomsverkryging is die regsverkryging juis onafhank lik van die medewerking van 'n voorganger in titel en is daar geen sprake van 'n regs*oorgang* nie"; and 702: "In meerdere Suid-Afrikaanse beslissings is met verwysing na van die gemeenregtelike gesag bevestig dat 'n geregtelike veiling weens die owerheidsanksionering daarvan aan die koper 'n beskermde oorspronklike eiendomsreg verleen wat nie deur uitwinning deur 'n ander met 'n beweerde sterkere reg bedreig kan word nie." Sonnekus relies on the following cases for the above statements: *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) 683G; *Sookdeyi v Sahadeo* 1952 (4) SA 568 (A)*; Gibson NO v Iscor Housing Utility Co Ltd* 1963 (3) SA 783 (T) 786C-D. See further the Supreme Court of Appeal decision in *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 13, where the court stated that a real right acquired through original acquisition (including acquisitive prescription) vests on the holder without registration, and therefore any knowledge of the right by the new owner of the servient land or his predecessor in title's consent is irrelevant. For academic support of this decision see AJ van der Walt *The law of servitudes* (2016) 26.

entitle the holder of a prior personal right to claim relief against the eventual acquirer of property at a sale in execution.

5 7 The solution of doctrinal problems

I have shown in this dissertation has shown that the reception of the doctrine of notice in South Africa law has caused several doctrinal problems in both the South African system of property law and in the basics of the South African law of contract. The first problem is that the doctrine of notice undermines the fundamental distinction in South African property law between real rights and personal rights. In chapter 2, I explained that in general, real rights are enforceable against the whole world (*in rem*) and are stronger than and superior to personal rights which can be enforced only against a specific person or groups of persons (*in personam*). It appears that the doctrine of notice contradicts this hierarchy. In the double-sales scenario, the second purchaser should have a superior right, as his or her acquired ownership is enforceable against the entire world, including the first purchaser who has only obtained a personal right from his or her contract with the seller. Consequently, when the first purchaser relies on the doctrine to acquire ownership from the second purchaser, it seems not only that the first purchaser's prior personal right trumps the real right, which has been gained by the second purchaser by registration in the deeds office, but also that the first purchaser could interdict the second purchaser from registering his or her personal right in the deeds registry. This distortion of the fundamental character of real and personal rights led Lubbe to comment that the doctrine appears to bestow on the personal right a characteristic "which is regarded as

the hallmark of a real right."[27] Van Heerden AJA remarked that this feature of the doctrine of notice bestows a real function on a prior personal right.[28] Badenhorst submits that upon successful application of the doctrine of notice, the personal right of the prior purchaser operates like a limited real right.[29] Zimmermann even goes so far as to state that the operation of the doctrine leads to a doctrinal anomaly in that a contractual relationship (personal right) is deemed to have been transformed into a real right.[30]

However, Tait warns that it is crucial to understand that the prior personal right does not trump an entirely sound real right. The fact that the real right of the seller or grantor of the right in double sale or other instances where the doctrine of notice finds application, is subject to a prior personal right (such as an unregistered servitude) does not render the seller or the grantor incapable of transferring ownership in the property. Instead, the real right of the second purchaser or grantee is voidable and therefore defective, and invariably leaves the acquired ownership open to being set aside or encumbered with a limited real right of which the second grantee had knowledge. The emphasis must not be placed on the right of the first purchaser; rather, the defective title of the second purchaser based on his or her knowledge of the prior personal right must be acknowledged. The doctrine does not endow the prior personal right with a magical

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[27] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 249.

[28] *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910G-H: "Die juiste seining na my mening is dat vanweë die kennisleer aan 'n persoonlike reg beperkte saaklik werking verleen word."

[29] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 122.

[30] R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 237.

status, but instead targets the basic weakness in the voidable title acquired by the second purchaser. The title is voidable because the second purchaser, at very least, acted in bad faith (*mala fide*) by continuing with the transaction while being aware of the first purchaser's prior right. The further acceptance that the personal right relied upon must be capable of being made real (*a ius in personam ad rem acquirendam*), would distance the doctrine from the somewhat radical view that a purely personal right without any proprietary benefit could defeat an entirely sound real right.[31]

The second problem with the doctrine of notice is that it appers to contradict the maxim *prior in tempore potior in jure est* (priority in time gives priority in law). The doctrine conflicts with the rules applicable to competing personal and real rights. The above maxim applies both in the competition between two conflicting real rights,[32] and between two competing personal rights.[33] In the event of a competition between a real right and a personal right, it is accepted that the real right prevails over the personal right.[34] However, in terms of the doctrine of notice, the personal right of the first purchaser against the seller trumps the real right acquired by the second purchaser.[35] Furthermore, parties with competitive personal rights *ad rem acquirendam* in land must race to register first, as the real right acquired on registration would trump the competing personal right. However,

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[31] NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 158-159.

[32] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 54-55; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 214.

[33] *Wahloo Sand BK v Trustee, Hambly Parker Trust* 2002 (2) SA 776 (SCA), 748I, 788E, 791A-H.

[34] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 214; *Meridian Bay Restaurant (Pty) Ltd v Mitchell* 2011 (4) SA 1 (SCA) para 12.

[35] CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 214.

the effect of the doctrine of notice is that although the first purchaser may have lost the race to the deeds registry, he or she can still claim that the "winning title" is voidable and can be set aside. In Scotland, the registration of land in his or her name in the deeds registry is labelled "an offside goal". The doctrine of notice is triggered by the *mala fides* inherent in the knowledge of the competing personal right of the first purchaser. The South African Supreme Court of Appeal confirmed this by holding that knowledge by a trustee on insolvency did not cause the doctrine to operate, thereby preventing the genuine "race to the register" from being undermined.[36]

A third problem is revealed in the application of the publicity principle. The publicity principle allows the second purchaser to rely on the deeds registry and to trust that it represents the true status of rights in land. However, since South Africa has a negative system of registration,[37] the second purchaser can seldom rely on the publicity principle to justify his or her acquisition of a full title. The position in the deeds registry is not at all what it appears to be as it fails to reveal that the status of the seller is subject to the personal right of the first purchaser. The knowledge on the part of the second purchaser of this prior personal right of the first purchaser, results in the second purchaser acquiring only a voidable title to the land.

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[36] *Meridian Bay Restaurant (Pty) Ltd v Mitchell* 2011 (4) SA 1 (SCA) para 26. See in general NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189.

[37] See GJ Pienaar "The real agreement as *causa* for the transfer of immovable property" (2015) 78 *THRHR* 47-62 52; CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 231.

The fourth problem with the doctrine of notice is that it allows the prior contract between the seller and the first purchaser to have repercussions for the second purchaser who was not privy to the contract. The doctrine is therefore in conflict with the widely recognised contract-law principle of privity of contract in that, although there is no privity of contract between the first and second purchasers, the first purchaser is allowed to sue the second purchaser for specific performance of his or her contract with the seller.

5 8 Doctrinal bases of the doctrine

5 8 1 General

Chapter 4 provides an analysis of the various doctrinal bases suggested in case law and in academic literature to justify the application of the doctrine of notice, which is labelled by Lubbe as a doctrine "in search of a theory." It is important to note that this search for a doctrinal basis focuses on why the second purchaser is penalised and does not necessarily in practice suffer consequences for the requirements for the application of the doctrine.[38] Badenhorst[39] remarks that despite only actual knowledge being required by the courts, the Supreme Court of Appeal in the *Meridian Bay* case discussed the following bases – equity, fraud, wrongfulness, fiction or an anomaly – without settling on any of them.[40] I now assess the various bases individually.

[38] Ponnan JA remarked in *Meridian Bay Restaurant (Pty) Ltd v Mitchell* 2011 (4) SA 1 (SCA) para 17 that "references to a species of fraud or mala fides on the part of the acquirer with knowledge of the earlier cases was nothing but a fiction to provide the doctrine of notice with theoretical support."

[39] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 126.

[40] See *Meridian Bay Restaurant (Pty) Ltd v Mitchell* 2011 (4) SA 1 (SCA) paras 13, 15, 23.

5 8 2 Equity

Meridian Bay Restaurant (Pty) Ltd v Mitchell[41] apparently accepts McKerron's view that the doctrine of notice is,

> "a purely equitable doctrine running contrary to the rule of strict law that a real right takes precedence over a merely personal right."[42]

The doctrine provides the "equitable solution" to address the injustice inflicted on the first purchaser by transfer being made to the second purchaser. However, given the vast differences between the South African and English property systems and the isolated growth of their concepts, one must conclude that the general South African law of property is radically different from its English equivalent. Furthermore, South African property law operates on an objective basis, seeking to clarify who has what rights – not who ought to have those rights according to subjective principles.[43] The South African law thus appears to honour certainty above fairness. Finally, the equity explanation focuses on the first purchaser (grantee) in double-sale and other applicable scenarios, while it is the tainted knowledge of the second purchaser which triggers the doctrine of notice, not the injustice laid upon the first purchaser. This is evidenced by the fact that were it not for his or her bad faith, the second purchaser would acquire full ownership on transfer or registration.

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[41] 2011 (4) SA 1 (SCA) paras 13, 31.

[42] RG McKerron "Purchaser with notice" (1935) 4 *SA Law Times* 178-182.

[43] Concerning accession of movables to land (inaedificatio), see the dictum of Nienaber JA in *Konstanz Properties (Pty) Ltd v Wm Spilhaus and Kie (WP) Bpk* 1996 (3) SA 273 (A) 284F-H.

The property conceptual basis should explain not why the first purchaser should be protected, but why the second purchaser should be penalised.[44]

5 8 3 Fraud and mala fides

Early South African authorities characterised the doctrine of notice as a species of fraud.[45] However, the nature of the fraud that leads to the operation of the doctrine remained unclear. It was soon realised that fraud as basis of the doctrine was not a specific or technical wrong which had to conform to the English tort of deceit.[46] Furthermore, in the scenario of knowledge of unregistered servitudes, it has been shown that one should not focus on the fraud of the grantor who contracted with the second grantee in breach of his or her obligation to the first grantee, but rather on the second grantee who participates in

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[44] See in general NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 162-163.

[45] In *Reynders v Rand Bank Ltd* 1978 (1) SA 630 (T) 637A, the court defined the doctrine as a "species of fraud," which GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 249 considers indicative of the "traditional judicial characterisation of the doctrine." Other cases that support the traditional judicial characterisation of the doctrine a "species of fraud" include amongst others by *Cohen v Shires, McHattie and King* (1881-1884) 1 SAR TS 41 per Kotze CJ; *De Jager v Sisana* 1930 AD 71 74 per Wessels JA; *Ridler v Gartner* 1920 TPD 249 259-260; and *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T) 893. See also FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 21: "for many years our courts have consistently advanced fraud or *mala fides* on the part of the acquirer of a real right as inherent justification for the doctrine of notice"; NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 165.

[46] NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 166.

the fraud of the grantor by accepting ownership of the property in the knowledge of the prior personal right of the prior grantee.[47] In one case, the Appellate Division has gone so far as to equate fraud with bad faith (*mala fides*) or the lack of good faith in accepting registration of the servitude with the knowledge of the prior right of the first grantee of the servitude.[48] It is important to recognise that the second purchaser is penalised because heor she was aware of the seller's fraud, and in choosing to continue with transfer (registration) regardless, is complicit in that fraud or *mala fides*.

Knowledge need not *consist* of a fraudulent act, for the knowledge *itself* is what invokes the fraudulent association. It does not matter how it happened that the second

[47] See the dictum of Wessels JA in *De Jager v Sisana* 1930 AD 71 84: "If A grants B a servitude, B has the right to that servitude as over against A, and he has the right to have that servitude registered. If C knows of the grant, then if he endeavours to get the land free of the servitude he is conspiring with A to defraud B of a valid right which he already has against A and which he can by registration acquire against the whole world. C is therefore *particeps fraudis* with A." See also Cillié J in *Manganese Corporation Ltd v South African Manganese Ltd* 1964 (2) SA 185 (W) 193H: "The fraud is really committed by the original grantee or seller who tries to sell the land unburdened. If he sells to a person with knowledge of the unregistered burden, his fraudulent scheme does not succeed because the purchaser is regarded as *having taken part in the fraud* …. The later purchaser with knowledge of the servitude also has knowledge of the fraud. By attempting to take the property free of the burden, he is, if not knowingly perpetuating the fraud, at least trying to take the benefit which flows from the fraud whether he pays more for the land or not: he would obtain the benefit of a fraud which he knew before he acquired the land". See also DL Carey Miller "Good faith in Scots property law" in ADM Forte (ed) *Good faith in contract and property* (1999) 103-129 109-110.

[48] See the following statement of Ogilvie Thompson JA in *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20B-D: "If, however, such purchaser has knowledge, at the time he acquires the property of the existence of a servitude he will subject to a possible exception be bound notwithstanding the absence of registration. The basis of this obligation is that in attempting, under such circumstances, to repudiate the servitude, the purchaser is *mala fide*, and that the law refuses to countenance any such attempted repudiation because, as it is put in some cases, it in reality amounts to a species of fraud. *Mala fides* is not readily presumed and clear proof of knowledge on his part is required before the court will hold a purchaser bound by an unregistered servitude."

purchaser acquired the property *mala fide*, but only that the second purchaser is now considered as having knowledge of the fraud and proceeds, nevertheless. One should distinguish two separate issues. On the one hand, one must establish what constitutes bad faith, and this could indeed lack any identifiable form of 'typical' fraud. On the other hand, the result of having met the bad faith test is that the second purchaser is found to have had knowledge that the fraud was happening, as required by the doctrine of notice. The elements involved in the second purchaser's bad faith should not be confused with the consequence of that bad faith.[49]

In summary, the participant analysis is not based on an independent act of fraud, but on the participation of the second purchaser in the fraud of the seller or grantor of the servitude. The participant analysis hinges entirely upon the conduct of the second purchaser who, with the required knowledge, participates in the fraud. Ultimately, fraud in its modern manifestation as *mala fides,* remains one of the most persuasive of the proposed conceptual bases for the doctrine of notice. This is because fraud constituted the original basis of the doctrine, and is justified by the participant analysis derived from South African case law.

[49] NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 168.

5 8 4 The doctrine as part of the property system of transfer of real rights

Lubbe,[50] and later Carey Miller,[51] are of the opinion that the doctrine of notice can be explained in terms of the fundamental principles used in the process of derivative acquisition. Lubbe submits that the sharp and rigid distinction between obligations *ex contractu* and property rights is tempered by the doctrine of notice. Confirming that an owner's or grantor's (A's) capacity to transfer ownership of, or encumber an asset, is not affected by the existence of a prior contractual undertaking to do so in favour of someone else (B), a breach of such undertaking as a result of transfer of the property to another (C), will not necessarily leave the disappointed grantee (B) only with remedies for the breach of contract against the faithless grantor (A). These authors emphasise the two-stage approach that underpins the South African system of transfer, which features both a preliminary contractual stage and a subsequent delivery stage.[52] The delivery stage is commonly associated with a certain positive act, namely delivery in the case of movables and registration in the case of land. Importantly for delivery or registration, there must be a real agreement, which consists of an *animus transferendi* – an intention to transfer on the part of the transferor – and an *animus accipiendi* – an intention to accept transfer on the part of the transferee. Carey Miller emphasises the fundamental role that intention

[50] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 248-249.

[51] The theory was developed in DL Carey Miller "Good faith in Scots property law" in ADM Forte (ed) *Good faith in contract and property* (1999) 103-129 103-102 & 127 and D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114.

[52] The distinction between these stages is also emphasised in the South African system, as discussed in CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 252.

plays in the transfer of property.[53] This means that in the context of the doctrine of notice the act of delivery or registration only results in acquisition of ownership if there is an antecedent real agreement.

Importantly, both Lubbe and Carey Miller have reservations about the quality of the *animus acquirendi* of the second purchaser or second grantee in double-sale and other scenarios to which the doctrine applies. Lubbe submits that the sharp and rigid distinction between obligations *ex contractu* and property rights is tempered by the doctrine of notice. He confirms that an owner's (A's) capacity to transfer ownership of, or encumber an asset, is not affected by the existence of a prior contractual undertaking to do so in favour of someone else (B).[54] Nevertheless, he suggests that a breach of such an undertaking by transfer of the property to another (C), will not necessarily leave the disappointed grantee (B) with only the remedies for the breach of contract against the

[53] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 114. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 273; GJ Pienaar "The real agreement as *causa* for the transfer of immovable property" (2015) 78 *THRHR* 47-62 48.

[54] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 114: "In each instance there is enough *animus* for title to pass, but knowledge of the wrong renders that intention flawed and thereby prevents the acquirer from taking a perfect title." See also JC Sonnekus "Regshandelinge in stryd met opsies en voorkoopsregte enersyds en andersyds handeling verrig deur regssubjekte onderworpe aan beperkinge van hul kompetesiebevogdhede-inhoudelik nie-verwarbaar" 2018 *TSAR* 632: "[Daar] haper niks met die oordraer se beskikkingsbevoegdheid of kompetensie om 'n geldige verbintenisskeppende en saaklike ooreenkoms met die latere koper te sluit nie." See also the same author at 634, 635.

faithless grantor (A). Exceptionally, the doctrine of notice protects the prior grantee (B) against the subsequent acquirer of the property.[55]

Carey Miller takes the matter further. He submits that bad faith causes the acquisition of a defective title by the second purchaser (C) as a result of an insufficient intention to acquire a perfect title. Importantly, he does not deny that the seller (A) had the required capacity to pass full ownership in the property, but that the intention of the second purchaser (C), though sufficient for transfer, is *mala fide* or lacking in good faith and therefore the second purchaser is capable of receiving no more than a voidable title which can be set aside by the first purchaser (B).[56] Carey Miller proposes that C's knowledge of the wrong means that he or she has insufficient intention to acquire an unimpeachable title.[57] He concludes that the double-sale scenario, in this respect, closely approximates other instances of defective acquisition. He mentions the example of a transferor whose intention to transfer is secured by the transferee's fraudulent inducement, giving a subsistent real right but a right that is open to reduction on proof of the acquirer's bad faith.

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[55] GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 248-249.

[56] DL Carey Miller "Good faith in Scots property law" in ADM Forte (ed) *Good faith in contract and property* (1999) 103-129 106-107 and D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 114. See also NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 170-171 and 173.

[57] D Carey Miller "A centenary offering: The double sale dilemma – Time to be laid to rest?" in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 96-114 114 and DL Carey Miller "Good faith in Scots property law" in ADM Forte (ed) *Good faith in contract and property* (1999) 103-129 106-107.

Carey Miller's approach demonstrates the technical operation of the doctrine by reliance on the basic principles of the South African system of transfer. He intricately weaves the doctrine into the core of South African property law. His approach does not undermine the property system, but rather operates flawlessly because of the system. Therefore, it seems entirely reasonable that a doctrine that revolves around a party's knowledge would have an impact on the intention of that party, both being connected mental elements.[58]

The fact that Carey Miller's focus on the defective *animus acquirendi* of the second purchaser (C) may be capable of explaining the voidable title of the second purchaser, has convinced Tait that Carey Miller's approach constitutes one of the two theories that is persuasive and provides valuable insights into the foundations of the doctrine of notice. Fraud in its modern form of *mala fides* presents a policy-based doctrine that has a long South African history, whilst the role of the real agreement portrays a principled doctrine, intertwined with the central principle of separation of contract and transfer (registration). Both theories demonstrate that the doctrine is rooted in South African property law, which would not destroy its most treasured principles.[59]

[58] See NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 171-172.

[59] NJM Tait "The offside goals rule: A discussion of basis and scope" in D Bain, RRM Paisley, RC Simpson & NJM Tait (eds) *Northern lights: Essays in private law in memory of Professor David Carey Miller* (2018) 153-189 174 and 178-179.

5 8 5 Delictual liability

Due to the failure of previous efforts to secure a place for the doctrine of notice in a property-law framework, Badenhorst states that academics and the courts attempted to base the operation of the doctrine on delictual liability.[60] A delict is defined as wrongful and blameworthy conduct that causes harm to a person.[61] A delict contains the following elements: (1) conduct; (2) wrongfulness; (3) fault; (4) a causal link between conduct and detrimental consequences; and (5) harm. The courts generally emphasise the separate elements of wrongful conduct and fault as explanations for the operation of the doctrine of notice. One court pronounced that the act of the second purchaser (C) in the double-sale scenario constitutes a wrongful infringement of the personal right of the first purchaser (B),[62] or amounts to a breach of a legal duty.[63] Other courts and academic writers pronounced that the acquisition of ownership by the second purchaser took place with *dolus eventualis*[64] or negligence.[65] Ponnan JA referred to the reliance of Supreme

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[60] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 124-125.

[61] JR Midgley & JC van der Walt "Delict" in PJ Rabie & J Faris *LAWSA* vol 8 (2nd ed 2005) para 23.

[62] *Cussons v Kroon* 2001 (4) SA 833 (SCA) para 12; FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21 31.

[63] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 31.

[64] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20F; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910H.

[65] NJ van der Merwe & PJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (6th ed 1989) 279-280. See however MCJ Bobbert "Kennisleer" (1996) 21 *TRW* 36-56 48; MCJ Bobbert "Kennisleer 'doctrine of notice' in die Suid-Afrikaanse reg" 1992 *De Rebus* 347-351 350; GF Lubbe "A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law" 1997 *Acta Juridica* 246-272 246, 253;

Court of Appeal in *Cussons v Kroon*[66] on the wrongfulness of a sale to a purchaser (C) in conflict with a right of pre-emption in favour of the seller's business partner (B), as a possible basis for the doctrine of notice.[67]

The problem with the construction of a delict or focusing on separate elements of a delict as a basis for the doctrine, is that the delictual action (the *actio legis Aquiliae*) is a compensatory remedy aimed at the recovery of patrimonial loss suffered as the result of the wrongful and culpable conduct of the defendant.[68] By contrast, the remedy claimed in terms of the doctrine of notice is a direct action against the second purchaser (C), or the second grantee, to be installed as the owner or to allow the first grantee to encumber the transferred ownership with a limited real right. Furthermore, the doctrine is irreconcilable with the elements of the doctrine as formulated by the courts.[69] I therefore conclude that the doctrine of notice does not fit into the principles and remedies of the law of delict.

5 8 6 Wrongfulness as doctrinal basis for the doctrine of notice

Brand has developed the theory that the doctrine of notice is based on the element of wrongfulness. His premise is that, although the doctrine of notice is not founded in delict, it shares a common element with delictual liability, namely wrongful conduct or non-

FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 27.

[66] *Cussons v Kroon* 2001 (4) SA 883 (SCA) par 12.

[67] *Meridian Bay Restaurant (Pty) Ltd v Mitchell* 2011 (4) SA 1 (SCA) para 23.

[68] JR Midgley & JC van der Walt "Delict" in PJ Rabie & J Faris *LAWSA* vol 8 (2nd ed 2005) para 8.

[69] See in this regard chapter 4, section 4.2.3.

compliance with a legal duty.[70] Characterising the damage caused in the doctrine of notice scenarios as instances of pure economic loss,[71] he continues that the imposition of a legal duty is a matter of judicial determination by employing the criteria of public and legal policy. In the context of the doctrine of notice this would mean, according to Brand, that an infringement of a prior personal right through the acquisition of a real right by the second purchaser or grantee, will be recognised as "wrongful" only if, for reasons of public and legal policy, the courts determine that such infringement should attract the consequences of the doctrine.[72]

Consequently, Brand suggests that the majority judgment by Streicher JA in *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others,*[73] is based on the premise that for reasons of public and legal policy an attachment in execution is not wrongful in the context of the doctrine of notice merely because the creditor who caused the attachment and execution sale had knowledge of a prior personal right.[74] Moreover, the considerations of legal and public policy that led Streicher JA to the conclusion of

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[70] This view has also been expressed by PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 87. The latter authors' are of a view that "infringement of a personal right by an acquirer of real right is perceived as unlawful conduct. The criteria for the determination of wrongfulness in the law of delict should be applied." See also *Cusson v Kroon* 2001 (4) SA 833 (SCA).

[71] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 31. See further *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) 12; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 SCA 14.

[72] FJD Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 31-32.

[73] 2007 (4) SA 380 (SCA).

[74] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32.

wrongfulness,[75] relate to the specific nature and purpose of an execution sale and the particular consideration that the purchaser at an execution sale should as far as possible acquire a secure title.[76] Brand then continues that outside of the attachment- in- execution scenario, *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*[77] remains the beacon of authority and that, therefore, *mala fides* or fraud on the part of the acquirer of the real right is not required and that mere knowledge of the existing personal right on the part of the acquirer of the real right is sufficient to render the acquisition wrongful.[78]

I agree with CG van der Merwe who submits that Brand used the grounds on which the court in *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others*[79]confirmed the claim of the holder of the prior personal right, to base the doctrine of notice on the breach of a legal duty (wrongfulness) on the part of the second purchaser in a double-sale scenario. *Dream Supreme Properties* was simply based on provisions of the Supreme Court Act [80] and the Uniform Rules of Court, which for reasons of public policy protect the security of the execution creditor against any challenge. Brand thus formulates a delictual theory around the public policy reasons proffered for the protection of the holder of a prior personal right on property sold in execution., but states expressly that

[75] *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) par 26.

[76] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32. See also CG van der Merwe "Things" in LTC Harms & FA Faris (eds) *LAWSA* vol 27 (2nd ed 2014) para 216.

[77] 1982 (3) SA 893 (A).

[7878] FDJ Brand "Knowledge and wrongfulness as elements of the doctrine of notice" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 21-36 32.

[79] 2007 (4) SA 380 (SCA).

[80] Act 59 of 1959.

this theory does not apply to the ordinary double-sale scenarios where the requirement of actual knowledge (or *dolus eventualis*) regarding the prior personal right still reigns supreme.

Apart from the fact that Brand does not offer an explanation of why the second purchaser's knowledge of the prior personal right of the first purchaser is branded as wrongful, his theory in essence remains a delictual theory, and thus subject to the criticism that the relief sought is a claim for compensation for pure economic loss[81] and not the realisation of the prior personal right of the first purchaser to acquire ownership in the property.[82] Furthermore, Brand's theory is based on a scenario that I have characterised as an instance of original acquisition of ownership in which the doctrine of notice plays no role.[83]

5 9 Why does the holder of a prior personal right have a direct action for relief against the second purchaser or second grantee of a limited real right?

In *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigte Bäckereien (Pty) Ltd,* Van Heerden AJA remarked that this feature of the doctrine of notice bestows a real function on a prior personal right.[84] Badenhorst, Pienaar and Mostert suggest that the

[81] It is difficult to accommodate this type of pure economic within the recognized categories of pure economic loss.

[82] See section 5.8.5 above.

[83] See section 5.6 above.

[84] *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) 910G-H: "Die juiste seining na my mening is dat vanweë die kennisleer aan 'n persoonlike reg beperkte saaklik werking verleen word."

holder of the previous personal right acquires a personal right with limited real effect.[85] In a recent contribution, Badenhorst goes even further and suggests that on successful application of the doctrine of notice, the personal right of the first purchaser operates like a limited real right against the second purchaser or second grantee who is not a party to the obligation between the first purchaser and seller. Accordingly, he argues that real operation is given to a personal right. He submits that the application of the doctrine of notice leads to a doctrinal anomaly, since an obligationary relationship (personal right) *is turned into a real right*.[86] Badenhorst quotes Zimmermann[87] in support of his submission. The question is whether this submission of Badenhorst and Zimmermann reflects the true legal position.

In my submission, this conclusion is not convincing. The real right that the authors refer to could be nothing other than a limited real right. In chapter 2, I have shown that although South African law does not adhere to the *numerus clausus* principle, the introduction of new limited real rights must be closely connected to the traditionally accepted real rights. This is not the case with the real right suggested by Badenhorst and Zimmermann. Consequently, it would be extremely difficult to fit such a right into the South African system of real rights.

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[85] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* (5th ed 2006) 86.

[86] PJ Badenhorst "The South African doctrine of notice: A comparative law perspective" (2015) 5 *Prop LR* 119-128 122.

[87] R Zimmerman "Good faith and equity" in R Zimmerman & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 237.

Ultimately, the type of relief that the holder of the prior personal right seeks, is best explained by the integration of the doctrine of notice in the South African (and Scots) two-step system of derivative acquisition of ownership or a limited real right in the property of another, as set out by Carey Miller and Tait.[88] Although it is accepted that the second purchaser or second grantee obtains full ownership of the property, despite the existence of a prior personal right, the fact that the second purchaser or grantee had knowledge of the prior personal right has the effect that the acquired ownership of the second purchaser or second grantee is voidable or subject to reduction. This means that the holder of the prior personal right is entitled to claim that the second purchaser or grantee of a limited real right must realise the prior personal right by deregistration of his or her ownership and registration in the name of the holder of the prior personal right, or by allowing the first grantee registration of a limited real right against his or her acquired ownership in the property.

[88] See section 5.8.4 above.

List of abbreviations

ASSAL	Annual Survey of South African Law
CILSA	Comparative and International Law Journal of Southern Africa
EJCL	Electronic Journal of Comparative Law
Israel LR	Israel Law Review
JAL	Journal of African Law
LAWSA	Law of South Africa
PELJ	Potchefstroom Electronic Law Journal
Prop LR	Property Law Review
SA Law Times	South African Law Times
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
The Juridical R	The Judicial Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
TWR	Tydskrif vir Regswetenskap
Yale LJ	Yale Law Journal

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Security by Means of Movable Property Act 57 of 1993

Subdivision of Agricultural land Act 70 of 1970

Supreme Court Act 59 of 1959

Uniform Rules of Court